AVOIDING RETALIATION CLAIMS

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I. INTRODUCTION

Retaliation . . . Black's Law Dictionary defines it as: to repay in kind; to get revenge. If this were in fact the case in the legal world, most retaliation claims would never see the light of day. Unfortunately, the court's definition of retaliation in the employment context is a bit murkier.

Recent statistics show that retaliation claims account for twenty-five percent of all complaints now filed with the Equal Employment Opportunity Commission ("EEOC"). One of the principles that make retaliation claims so appealing to plaintiffs is the broad scope that they cover. An employee does not need to show a successful underlying claim (i.e. discrimination) for a retaliation suit to be successful. In *Johnson v. University of Cincinnati*,[1] the Sixth Circuit Court of Appeals overruled the District Court's decision to throw out Johnson's retaliation claim. Johnson's underlying claim charged the university with discrimination, not based on his own characteristics, rather based on the race and gender of the individuals he represented in his position as manager of the university's affirmative action program. The Sixth Circuit noted:

> The only qualification that is placed upon an employee's invocation of protection under Title VII's opposition clause is that the manner of his opposition must be *reasonable* . . . . [T]he complaint may be made by anyone and it may be made to . . . anyone about alleged discrimination against oneself or others; the alleged discriminatory acts need not be actually illegal in order for the opposition clause to apply; and the person claiming retaliation need not be the person engaging in the opposing conduct.[2]

This case illustrates the broad approach courts are taking when dealing with retaliation claims. For Johnson to prevail on the underlying discrimination claims will take

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[1] 215 F.3d 561 (6th Cir. 2000).

[2] *Id.* at 580.

some creative lawyering, but the court is clear that he has a chance of winning his retaliation claim even if the underlying discrimination claim lacks merit. This is the kind of thing that should be avoided. In short, a weak underlying discrimination claim can turn into a strong retaliation claim if not handled correctly.

As in any situation, having the knowledge of what to expect and what is expected is the best way to build a defense against a retaliation claim. The following cases demonstrate how the courts currently view retaliation claims with an eye toward what trends are emerging. That knowledge will serve as the basis for practical tips on how to avoid the retaliation trap.

II. THE TWO HEADS OF RETALIATION

Title 42 of the United States Code, section 2000e-3(a), allows an employee to bring a claim of retaliation against his/her employer if the employer discriminates against the employee for *participating* in a protected activity or for *opposing* an alleged unlawful discriminatory activity.[3]

A. Participation In A Protected Activity

Historically, this is the most frequently used basis of a retaliation claim. If an employee claims that she was fired, demoted, or any one of a number of other adverse employment actions were taken against the employee because that employee reported or filed a claim for discrimination, that employee may bring a retaliation claim against her employer.

One thing that has become clear is that an employee does not have to be participating in an official EEOC investigation in order to be protected for "participat[ing] in *any* manner" with an EEOC investigation.[4] The Eleventh Circuit, in *Clover v. Total Systems, Inc.*,[5] stated that a plaintiff's involvement with her employer's internal investigation of a sexual harassment matter was enough to invoke the protection of section 2000e-3(a). The employer argued that because the employee was not participating directly with the EEOC investigation, she was not participating in a protected activity. The Eleventh Circuit did not see it that way. The court reasoned that the purpose of the retaliation claim was to "confer 'exceptionally broad protection'" to employees.

The District Court for the District of Columbia followed similar logic in *Martin v. Howard University*.[6] The university contended that the employee did not engage in protected activity because she had not personally filed a charge with the EEOC, therefore, the

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[3] 42 U.S.C. §2000e-3(a).

[4] *Id.*

[5] 176 F.3d 1346 (11th Cir. 1999).

[6] 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999)

university could not have retaliated against her because it would not have notice of her claim until it learned of her EEOC complaint. The court disagreed with the university's position. It held that "an EEOC complaint is not a legal prerequisite for a retaliation claim."

In the *Martin* case, the plaintiff alleged that a homeless man, who had free access to the university's law library and campus, and had a history of violence, was creating a hostile work environment for her. The court said that, "although Mr. Harrison was not a university employee, the university may be responsible for his conduct if it knew or should have known that Mr. Harrison's actions created a hostile work environment for the Plaintiff and failed to take corrective action." Therefore, although the university did not employ the alleged harasser, and although the plaintiff never filed an official EEOC complaint, the university could be held liable for retaliation.

Although it appears that retaliation is becoming easier and easier to claim, the employer always has a significant defense available so long as it can demonstrate that it had a legitimate non-discriminatory reason for the action in question. In *Stanley v. University of Southern California*,[7] the Ninth Circuit refused to accept the plaintiff's argument that she was terminated because she filed a complaint under the Equal Pay Act. The plaintiff claimed that as the women's basketball coach she was entitled to the same pay as the men's basketball coach because they did the same job. The school did not agree and refused to increase her salary to match his. The university extended an offer to the Plaintiff and left that offer open even after she demanded to be paid the same amount as her male counterpart. The school stated that she was terminated because she refused to accept the offer within the time frame that it was open. The Ninth Circuit concluded that the university's rationale supported its actions. The university did not appear to retaliate against the Plaintiff, rather it made a decision based on legal criteria to offer the Plaintiff less money, and it could not therefore be held liable because the Plaintiff refused to accept that offer.

B. Opposition To Allegedly Unlawful Discrimination

When an employee opposes an employer's unlawful, discriminatory activities, the employer cannot take retaliatory actions against that employee. This is true even if the employer's actions are not in fact illegal or discriminatory. It is a fallacy to believe that an employer can defend against a retaliation suit by showing that the underlying claim was legal action by the employer. Generally, an employee need only show that she believed in *good faith* that the alleged activity was in fact discriminatory, and she acted *reasonably* in her opposition.

As with any discrimination claim, the ultimate burden of proof lies with the employee making the claim. In the case of retaliation, if the employee cannot prove a causal connection between the discrimination complaint and the alleged retaliatory action, then the

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[7] 178 F.3d 1069 (9th Cir. 1999).

claim cannot succeed. In *Texas A&M University v. Chambers*,[8] the Texas Court of Appeals reversed a jury verdict for a former university employee because the judge improperly included a presumption of retaliation in instructions to the jury. The employee sued the university for alleged retaliation based on the university's termination of the employee for making a report to the university's internal audit department. At the close of the trial, the judge instructed the jury that retaliation was to be presumed if the adverse employment action took place within ninety days of the employee's opposition to an allegedly unlawful act, and that the university had to rebut this presumption. The Court of Appeals concluded that the university had provided plenty of rebuttal evidence at trial, and therefore, the presumption should have disappeared entirely. The burden was on the employee to prove the causal link between the adverse employment action and retaliation. His reliance on the presumption was misplaced.

Within the area of opposition, the courts have found employee actions lacking where their opposing conduct has been categorized as either, "too little" or "too much." For example, in *Coutu v. Martin County Board of Commissioners*,[9] the Eleventh Circuit found that retaliation did not exist because the employee was spending so much of her time opposing the employer's alleged discriminatory activity that she was not fulfilling the duties of her job. Where an employee is neglecting her employment duties, and legitimate concerns arise about her not doing her job, the employer is allowed to take disciplinary action against the employee because their opposition involvement is "too much." In that situation the cause of the disciplinary action was the employee's opposition activity, but because it affected how she did her job, the court held that the employer acted in a proper manner.

At the same time, an employee cannot hold the employer responsible for retaliation where the employee has done "too little" opposition. In *Tiwari v. Board of Regents of University System of Georgia*,[10] the Eleventh Circuit (in an unpublished opinion) affirmed a summary judgment granted to the employer because the employee could not present enough evidence that the university's denial of promotion was based on his opposition to the university official's alleged anti-Semitic views. In other words, an employee must show that opposing activity does in fact exist in order to hold an employer liable for retaliation.

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[8] 2000 Tex. App. LEXIS 7360.

[9] 47 F.3d 1068 (11th Cir. 1995).

[10] 180 F.3d 273 (11th Cir. 1999).

III. TAKING THE BULL BY THE HORNS

C. Adverse Employment Activity

Many retaliation claims arise from an employer's "ultimate employment action." Included under this heading are hiring, firing, promoting, and compensation. If the employer does not take an action that rises to the level of "ultimate employment action," then the courts are split as to whether an employee can argue a retaliation claim. The Fourth,[11] Fifth,[12] and Eighth[13] Circuits have recently handed down decisions that would tend to allow retaliation claims to succeed only where an "ultimate employment action" has occurred. However, even in these circuits that is not always the rule. Since the United States Supreme Court has not yet ruled on this issue, this dispute in the circuits is not settled. Unless or until this dispute is resolved by the Supreme Court, it is important to identify the difference between an "ultimate employment action," and an "intermediate employment action."

In *Bowman v.* Shawnee *State University*,[14] an employee claimed that he was sexually harassed. He claimed that as a result of his complaints about the harassment the university retaliated against him when it removed him from his position as coordinator of sports studies. The Sixth Circuit stated that this was a *de minimus* employment action and therefore, did not constitute an adverse employment action. The court took into account that he was re-appointed to his position after ten days and that the position was merely a title. His pay was not reduced and he was still a full-time instructor. Without evidence that the coordinator title was considered more prestigious than that of full-time instructor, the court held that the university's actions were non-materially adverse.

Where a materially adverse action is not present, the courts are more reluctant to allow a claim of retaliation to survive. For example, a poor performance evaluation or a substandard pay raise may not be considered a materially adverse employment action.[15]

A lateral job transfer is a closer call, but a retaliation claim can be avoided when the employer shows that similar duties are required and/or the employee has the same chance to

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[11] *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999)(holding that retaliation claim based on a reassingment of duties can exist only if it has a significant detrimental effect on the employment relationship).

[12] *Burger v. Central Apt. Management*, 168 F.3d 875 (5th Cir. 1999)(holding that a lateral transfer with the same duties and wages was not an "ultimate employment decision," and therefore, not enough to support a retaliation claim).

[13] *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997)(holding that an "Ultimate employment decision" was a necessary element of a retaliation claim under Title VII).

[14] 220 F.3d 456 (6th Cir. 2000).

[15] *Chwen-Jye Ju v. Sharp Microelectronics Tech, Inc.*, 2000 U.S. App. LEXIS 31920 (9th Cir. 2000)(The plaintiff was terminated for filing a discrimination claim. He was reinstated but filed a retaliation suit when he received a negative performance evaluation and a substandard pay raise. The court held that the employer's actions did not rise to the level of an adverse employment action.)

succeed in this new position. In *Hill v. American General Finance, Inc.*,[16] an employee filed a retaliation suit against her employer because she complained of sexual harassment. The employer transferred the employee to another office, but the employee claimed that the office was in a high-crime area and was therefore an adverse employment action. The employee also claimed that she was forced out of the assistant manager training program. The Seventh Circuit ruled that the transfer was in fact to an office with greater opportunities for advancement, and that the employee willfully left the training program. Because the employee did not suffer any adverse employment action, the court rejected her retaliation claim. Similarly, where an employee is kept in the same job, but her shift has been changed, the employer must be aware of the conflicts that may arise (i.e. going from a day shift to a night shift where a single parent may have to find a place for her children to go while she is at work at night).

If the employer's action is part of a general personnel change (i.e. Reduction in Force) the employee must show that she was singled out for retaliation purposes. In *Manning v. McGraw-Hill Inc.*,[17] a jury awarded the plaintiff damages when it found that the employer terminated the plaintiff for discriminatory reasons. The Tenth Circuit overruled the trial court's determination. It found that the employer presented substantial evidence for its decision to terminate the plaintiff, including poor performance and an overall reduction in force.

D. Finding The Silver Lining

In addition to the information above, employers should look for other signs that an employee's retaliation claim is improper.

1. The Job Of The Employee

As stated above, if an employee gets involved with activities outside of the stated employment duties, they do so at their own peril. This is much more so when the duties of the employee come into direct conflict with that which they are participating in or opposing. In *Jones v. Flagship International*,[18] the employee who brought the retaliation claim against his employer was the manager of the employer's EEO programs. In this position he was responsible for protecting the employer against discrimination claims brought by its employees. While in this position he gave advice to other employees and was alleged to have solicited and encouraged employees to bring EEOC claims against the employer as well as to file class action suits. Although the employee was opposing alleged discrimination against the employer, because of the nature of his position the court held that his activity was not protected and that he could therefore be removed from his position.

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[16] 2000 WL 536670 (7th Cir. 2000).

[17] 2000 U.S. App. Lexis 13934 (10th Cir. 2000).

[18] 793 F.2d 714 (5th Cir. 1986).

As an employer, be aware of the nature of the position that an employee who makes a retaliation claim holds. It is possible that her position may come into conflict with the claim itself. This can also work in the reverse. As mentioned in *Johnson* in the first section, the duties of an employee's job may be reason enough to bring a retaliation claim.

2. Temporal Proximity

The closer an adverse employment action occurs to the participation in a protected activity, or the opposition to an alleged illegal employment practice, the more likely it is that a court will find retaliation. As exemplified by the *Chambers* decision, many courts are ready to assume a presumption of retaliation. Although the appellate court reversed the case, it did so only because the employer presented enough evidence that negated that presumption. While the length of time between protected speech and an adverse employment action can create an inference of causation, the inference only applies when the length of time between these events is fairly short. Courts have continuously held that a six-month period of time between a protected activity or opposition and an adverse employment action will not suggest a causal link.[19] Indeed, in *Hughes v. Derwinski*,[20] the court held that a period of four months between filing a complaint and receiving a disciplinary letter was enough to sever the causal relation between the two. Be aware of the time between actions, but at the same time, if the employer's adverse employment decision is a legitimate one, backed by the appropriate documentation, then the employer should not hesitate to take the correct action.

3. The Boundaries Of Protected Activity

While an employee is protected for participating in protected activity, the employer should be aware that this has its limits. While investigating the underlying claim, an employer should pay particular attention to the activities of the employee. If the employee goes outside the bounds or protected activity, a retaliation suit may be avoided. In *Hochstadt v. WorcesterFoundation*,[21] the plaintiff criticized the foundation and its managers while at the same time complaining about her own position and salary within the foundation. The First Circuit balanced the rights of the employee to engage in protected activity with Congress' desire not to unduly restrict an employer's personnel decisions. The court held that conduct aimed at achieving purely ulterior motives or even proper objectives achieved through improper means, could have an effect contrary to Congress' goal. In *Hochstadt* the

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[19] *Valdez v. Mercy Hospital*, 961 F.2d 1301 (8th Cir. 1992)(no relation where six months passed between protected activity and termination); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998)(five-month period between protected expression and adverse employment action does not suggest a causal link); *Mullinix v. Forsyth Dental Infirmary for Children*, 965 F. Supp. 120 (D. Mass. 1996)(where an employee's twelve-month appointment was not renewed three months after she filed a discrimination lawsuit, the court held that the timing of the two were not causally linked)

[20] 967 F.2d 1168 (7th Cir. 1992).

[21] 545 F.2d 222 (1st Cir. 1976).

court determined that the plaintiffs actions went "too far," and had damaged the basic goals of her employer. While every situation is unique, if an employee's purpose for her action is suspect, it is an avenue worth pursuing.

IV. MANAGING WITHIN THE JUST CAUSE STANDARD

Managing employees with performance or disciplinary issues is difficult. When those issues are coupled with an employee's discrimination claim, they are potentially hazardous. Yet even with a pending claim, it is important to continue managing all employees equally. The following four elements will help guide managers in this process.

A. Notice

Employees should have notice of performance standards and behavioral rules, notice that they are not meeting those rules, and notice of the penalty for failing to improve or correct deficiencies. This is where all disciplinary action should begin regardless of whether an employee has filed a discrimination claim. When an employee is aware of the rules and performance standards that she is required to meet, then an employer's action against any deficiencies of those standards are neither a surprise nor a pretext for retaliation.

When an employee files a discrimination claim, that employee is still subject to the same rules and performance requirements of all other employees. This should be clear to the complaining employee. Make it a point to clearly express the employer's position with regards to the company's rules and regulations. Explain the company's policy against retaliation and clarify with the employee that any action the employer takes while managing that employee is done so through the company's discipline procedures and is not related to the employee's discrimination claim. Because it is always important to document everything related to a discrimination claim, any information conveyed to the employee should be documented and a copy given to the employee.

In addition, issues of notice should be made clear to all personnel that have contact with and knowledge of the complaining employee and her claim. For example, the complaining employee should continue to be included in any meetings or projects that she would normally be included in. Do not allow other personnel to cut off communication with the complaining employee.

B. Investigation

Conduct a fair and thorough investigation into performance deficiencies or misconduct. This is a good policy to follow in any situation, however, when a discrimination claim is pending, it is that much more important. In addition to the investigation, it is a good idea to allow the complaining employee an opportunity to be heard on the issue of misconduct or performance deficiencies prior to any discipline being taken by the employer.

Constitutional due process requires that an individual be given a meaningful opportunity to be heard. By allowing a complaining employee this opportunity when

performance or misconduct issues arise, the employer clarifies its reasons for its proposed action against the employee. If a retaliation suit is filed, the employer can use this as a legitimate reason for its actions and construct a wall between its action and the complaining employee's underlying discrimination claim. An employer creates a strong defense when it argues that a complaining employee was given an opportunity to be heard consistent with that of the constitution.

C. Consistency

Always treat an employee with a pending discrimination claim the same way a similarly situated non-complaining employee would be treated. The complaining employee is still responsible for effectively fulfilling her job duties. If a complaining employee's performance suffers because she is not being treated the same as other similarly situated employees, a retaliation claim is sure to follow. As stated above, make sure all managers and personnel that work with the complaining employee understand the implications of different treatment.

Consistent treatment is especially important when issues of misconduct or performance deficiencies arise. If the complaining employee is treated differently, it becomes more difficult for an employer to defend against a retaliation suit. Conversely, if the complaining employee is treated similarly, the burden on the employee to show a nexus between the employer's action and the employee's discrimination claim becomes more onerous.

D. Corrective Counseling/Progressive Discipline

Employers have the right to expect that all employees are successfully completing their job duties. When misconduct or performance deficiency issues do arise that require action by the employer, it is best to have a corrective counseling/progressive discipline policy in place. If a complaining employee is terminated without so much as a verbal or written warning, even though that may be within the employer's right to do so, it can be sure that the employee will argue a causal link between her termination and her discrimination claim.

Communication with the complaining employee about any problems, allowing them an opportunity to respond to the employer's concerns, and making sure that the complaining employee is being given the same respect as all other employees will help the employer avoid any retaliation claims. Furthermore, by clearly following the above procedures, corrective counseling or progressive discipline will not be done with a perception of malice or retaliation and therefore, the employer is free to effectively manage all employees regardless of any pending discrimination claims.