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RETALIATION

A 15-year rise in retaliation claims filed with the Equal Employment Opportunity Commission has pushed such claims to the status of ''most frequently filed,'' surpassing race discrimination or other claims. Meanwhile, with its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*, the U.S. Supreme Court began an expansion of retaliation rights that has continued to this day, Dechert attorney Alan D. Berkowitz and Temple University Freedman Fellow Leora F. Eisenstadt say in this BNA Insights article.

Reviewing pertinent cases that followed *Burlington Northern*, the authors recommend ssteps employers can take to reduce the risk of facing retaliation claims or defending themselves against such claims. In particular, they say that in light of the court's expansion of retaliation rights, many employer anti-retaliation policies are outdated or unduly narrow and would not encompass claims that have been recognized as potentially actionable.

The Ever-Expanding World of Retaliation: The Supreme Court Continues the Trend

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Introduction

Retaliation claims, filed as stand-alone claims or in connection with race, sex, age, or other discrimination claims, have been on the rise for more than 15 years. According to Equal Employment Opportunity Commission data, retaliation claims increased by approximately 100 percent between 1992 and 2006. By 2009, retaliation claims constituted 36 percent of the total charges filed, and in 2010, retaliation claims under

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all statutes (36,258 total) surpassed race discrimination claims (35,890 total) as the most frequent type of claim asserted in filed charges. The rise is likely a result both of an expansion of retaliation rights recognized by the courts and a realization on the part of plaintiffs and their attorneys that retaliation claims are more likely to get to trial and to prevail at trial than are standard discrimination claims.

The Supreme Court's expansion of retaliation rights began with its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 98 FEP Cases 385 (2006), which lowered the standard plaintiffs must prove to win a retaliation claim under Title VII of the 1964 Civil Rights Act. *Burlington Northern* essentially held that instead of demonstrating that an employer engaged in conduct that materially adversely affected the employee in the terms or conditions of employment, an ''adverse action'' is any action by an employer that ''well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'' Id. at 68. The consequences of this ruling are significant. For example, whereas a reassignment of duties with no impact on pay or benefits may not be an adverse employment action for purposes of a discrimination claim, it may be the basis of a retaliation claim. See id. at 70-71.

In the last four years, the Supreme Court has continued this trend and has expanded the reach of retaliation claims under a variety of employment-related statutes. This article examines the Supreme Court's private sector cases subsequent to *Burlington Northern,* and provides some practical steps employers can take to protect against such claims going forward.

The Supreme Court's Retaliation Cases From 2008-2011

2008:

The Civil Rights Act of 1866 (42 U.S.C. § 1981) prohibits retaliation against an employee who complains about the violation of another employee's contract rights.

CBOCS West Inc. v. Humphries, 553 U.S. 442, 103 FEP Cases 481(2008)

In *CBOCS West Inc. v. Humphries*, the Supreme Court held that retaliation constitutes a cognizable claim under The Civil Rights Act of 1866 (42 U.S.C. § 1981). Siding with the employee, the court held that an employee could bring a claim for retaliation when alleging that the employer retaliated against him or her because the worker complained about the employer's violation of another employee's contract-related rights.

Section 1981 is the portion of the 1866 Civil Rights Act that protects the right to create and enforce contracts. The act specifically provides that ''all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts as is enjoyed by white citizens.''

Humphries was an African American. He worked as an assistant manager of a Cracker Barrel restaurant before his termination. The defendant below, CBOCS West Inc., owned the Cracker Barrel restaurant chain. In his complaint, Humphries alleged that CBOCS dismissed him from his assistant manager position because of race bias and because he had complained to managers that a fellow assistant manager had dismissed another black employee for race-based reasons. Humphries filed with the EEOC and then filed suit alleging that CBOCS had violated both Title VII and Section 1981.

The Supreme Court based its holding, in significant part, on *stare decisis* principles. The court considered a comparable question in *Sullivan v. Little Hunting Park Inc.*, 396 U.S. 229 (1969), when construing the reach of Section 1982, a companion provision to Section 1981 in the Civil Rights Act of 1866. In *Sullivan*, Little Hunting Park operated a recreational facility whereby a membership share entitled the owner to use of its facilities. Sullivan had entered into an agreement with Freeman, an African American individual, to transfer his membership share to him. However, Little Hunting Park denied the transfer on the basis of Freeman's race and expelled Sullivan from the property. Sullivan brought a retaliation claim and prevailed under Section 1982 of the Civil Rights Act of 1866. The drafters wrote Sections 1981 and 1982 with nearly identical language. The only major difference between the two statutes concerns the rights that each statute protects. As a result, the court decided to construe the two statutes similarly.

In deciding to extend the language in Section 1981 to include retaliation claims, the court noted that it had retreated somewhat from *Sullivan* in the intervening years and set out to restore its prior line of cases. The court made such a departure in *Patterson v. McLean Credit Union*, 491 U.S. 164, 49 FEP Cases 1814 (1989), where it interpreted the phrase ''make and enforce contracts'' narrowly. Reasoning that the act did not reach the conduct of employers after the parties had entered into the contract, many lower courts subsequently held that Section 1981 did not encompass a retaliation claim.

In 1991, Congress amended the 1866 act to overturn *Patterson* and defined making and enforcing contracts to include: ''making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.'' The 1991 amendments specifically defined the scope of Section 1981 to include post-contract formation conduct.

CBOCS argued that Congress did not intend the 1991 amendments to include protection for retaliation because Congress did not include a specific anti-retaliation provision, but the court concluded that Congress had full knowledge of its decisions in *Sullivan* and *Patterson*.

The Supreme Court also rejected CBOCS's argument that providing for a retaliation claim under Section 1981 would overlap with Title VII, but without the same procedural requirements in place for Title VII. For instance, Section 1981 does not require the filing of a charge with the EEOC and does not require employer notification prior to filing suit. The court, however, reasoned that this overlap already exists with respect to direct employment-related discrimination and that to some extent there is a necessary overlap between Title VII and Section 1981.

2009:

Title VII's opposition clause prohibits retaliation against employees who participate in internal investigations, including those who merely respond to employers' questions.

Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 105 FEP Cases 353 (2009)

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Plaintiff Vicky Crawford was an employee of defendant Metropolitan Government of Nashville and Davidson County, Tenn. (''Metro''). When Metro questioned Crawford during an internal investigation of alleged sexual harassment, Crawford informed the investigator of inappropriate conduct by the accused employee directed at her. Although Metro took no action against the target of the investigation, it did fire Crawford, and two other employees who mentioned inappropriate conduct, soon after the investigation ended. Crawford filed a charge with EEOC, and then filed the lawsuit at issue, claiming retaliation for her report of the inappropriate behavior in the course of the internal investigation.

The ''opposition clause'' of Title VII's anti-retaliation provision prohibits an employer from taking adverse action against an employee ''because he has opposed any practice made an unlawful employment practice by this subchapter.'' The Sixth Circuit affirmed summary judgment for Metro, reasoning that the opposition clause of Title VII's anti-retaliation provision covered only ''active, consistent'' oppositional behavior. Crawford's mere response to Metro's inquiries, without initiating any complaint of her own, did not meet this standard.

The Supreme Court rejected the Sixth Circuit's interpretation. Noting that the term ''oppose'' is not defined in Title VII, the court stated that its ordinary meaning applies. Looking to dictionary definitions and natural understanding, the court concluded that ''oppose'' goes beyond ''active, consistent'' behavior in ordinary discourse. The court cited the example of those who ''oppose'' capital punishment, yet do not write letters, take to the streets, or resist the government.

According to the court, it is reasonable to assume that any individual who reports inappropriate behavior, as Crawford did, in response to an inquiry, opposes the behavior. The court concluded that there is ''no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.'' 129 S. Ct. 846, 851.

The court also rejected the employer's argument that granting retaliation protection to an individual who simply responds to an internal investigation would deter an employer from conducting such investigations for fear that retaliation would become an easy charge when ''things go bad for an employee who responded to enquiries.'' Id. at 852. The court responded that this argument underestimates the employer's incentive to conduct a thorough internal investigation to take advantage of the *Ellerth-Faragher* affirmative defense, which allows an employer to defeat liability (assuming there has been no tangible adverse employment action taken against the employee) if it exercises reasonable care to promptly correct discriminatory conduct and the complainant unreasonably fails to take advantage of any corrective opportunities.

In a concurring opinion that offers some comfort to employers, Justice Samuel Alito stressed that ''the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct,'' id. at 853, as opposed to silent opposition.

2011:

Title VII's anti-retaliation provision applies to third parties who claim they were retaliated against for the actions of a close family member.

Thompson v. North American Stainless, LP, 131 S. Ct. 863, 111 FEP Cases 385 (2011)

In *Thompson v. North American Stainless LP*, the Supreme Court unanimously (with Justice Elena Kagan recusing herself and two justices filing a concurring opinion) concluded that Title VII prohibits retaliation against third-party employees who are closely related to the employee exercising his or her statutory rights and that such third parties have standing to sue under the statute. The petitioner, Eric Thompson, and his fianceé, Miriam Regalado, were both employees of North American Stainless. Regalado filed an EEOC charge against the company alleging sex discrimination, and three weeks later, the company fired Thompson. Thompson then filed his own charge and ultimately a lawsuit under Title VII, claiming that his firing was in retaliation for his fiancee's sex discrimination charge.

The district court granted summary judgment for the company, concluding that Title VII ''does not permit third party retaliation claims.'' In an *en banc* decision, the Sixth Circuit sided with the Third, Fifth, and Eighth circuits, which have construed Title VII's anti-retaliation provision to cover only those claims brought by the individual who personally engaged in the protected activity.

In its opinion, authored by Justice Antonin Scalia, the Supreme Court reversed the Sixth Circuit, finding, with ''little difficulty,'' that Thompson's termination violated Title VII. Relying on its holding in *Burlington*, that Title VII's anti-retaliation prohibition covers any employer action that ''might have dissuaded a reasonable worker from making or supporting a charge of discrimination,'' the court concluded that the firing of one's fianceé was certainly covered by the provision. The court stated: ''We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.'' The court declined to provide specific guidelines regarding which third parties would be covered, noting only that a close family member would almost always qualify while a mere acquaintance was unlikely to qualify and suggesting that courts will have to decide this issue based on the particular circumstances of the cases before them.

Having reached the conclusion that the termination constituted prohibited retaliation under Title VII, the court then addressed whether Thompson had standing to sue under Title VII. The statute provides that an action can be brought by ''the person claiming to be aggrieved.'' The court refused to conclude that this provision conferred a right to sue on all those who satisfy Article III standing requirements, noting that this would lead to absurd results—for example, a shareholder could sue a company for firing a valuable employee based on his race if that termination led to a decrease in the value of the company's stock. Instead, the court held that the term ''aggrieved'' in the statute had a narrower meaning in that it enabled suit by any person with an interest arguably protected by Title VII. In this case, the court held that Thompson was undeniably ''within the zone of interests protected by Title VII'' because Thompson, an employee, was fired as a means of harming Regalado, another employee, who had filed an EEOC charge.

Oral complaints are protected activity under the Fair Labor Standards Act's anti-retaliation provision.

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 17 WH Cases 2d (2011)

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the latest retaliation case decided in the 2010-2011 term, the court considered whether oral complaints are protected activity under the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3). Kevin Kasten, an employee in a Saint-Gobain facility, had received several warnings from supervisors related to swiping in and out of the time clock. Kasten claimed that he orally complained to his supervisors several times about the location of the clock, claiming that the location prevented employees from being paid for time spent donning and doffing their required protective gear. However, he never filed a written complaint with his supervisors or any outside agency. Kasten was then terminated and brought suit claiming that he was retaliated against for making complaints covered by the FLSA.

In addressing this claim, the Seventh Circuit first concluded, in line with the majority of other courts, that internal complaints are protected under the FLSA. However, after looking to the language of the FLSA, which prohibits discharge of any employee who has ''*filed* any complaint,'' 29 U.S.C. § 215(a)(3) (emphasis added by *Kasten* court), the court concluded that the verb ''to file'' connotes a writing and cannot include oral complaints.

Looking to the text of the statute, Justice Stephen Breyer, writing for a six-justice majority, focused first on the dictionary definitions of the word ''file.'' He noted that while some definitions contemplate a writing, there are a variety of definitions that do not limit the scope of the phrase to a written document. In addition, the court reviewed a series of state laws that use the term ''file'' to refer to both written and oral complaints, along with regulations promulgated by various federal agencies that do the same.

Looking further, the court considered the act's objectives as well as the position of the Secretary of Labor and the EEOC on this issue. In terms of the FLSA's objectives, the primary purpose is to maintain the health, efficiency, and well-being of workers and the law sets out wage, hour, and overtime standards to that end. The act relies on the complaints and reports of workers to facilitate its enforcement, and the purpose of the anti-retaliation provision is to ensure that those complaints can be freely made without fear of retribution by an employer. After considering the historical period in which the FLSA was passed and the poverty and illiteracy of many of the nation's workers during that time, the court suggested that oral complaints may have been the sole type of grievance made by many workers. Finally, the court noted that both the Department of Labor and the EEOC hold the view that the filing of a complaint under the FLSA's anti-retaliation provision includes both oral and written complaints.

While the court noted the employer's view that the term ''file'' connotes a ''serious occasion'' of some formality, it ultimately concluded that ''a complaint is 'filed' when a reasonable objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act'' and that ''this standard can be met . . . by oral complaints, as well as by written ones.''

Interestingly, the court did not decide whether internal complaints to employers are protected, or whether the employee must submit his claim to the government. Although the government/private employer issue remains undecided, language in the majority opinion suggests that this issue also will be resolved in favor of broad coverage when the Supreme Court chooses to decide it.

Practical Tips for Employers.

There are a number of steps employers can take to reduce the risk of retaliation claims and to prepare to defend against claims that are filed. Below is a brief summary of the most important steps:

Update Existing Anti-Retaliation Policies: Employers already should have in place anti-retaliation policies. In light of the Supreme Court's expansion of retaliation rights, however, many of those policies are outdated or unduly narrow. It is important that employers keep up with the law by ensuring that existing policies are broad enough to encompass retaliation claims that have been recognized as potentially actionable.

Provide Training: Many supervisors do not understand the scope of retaliation protection. Even worse, supervisors may have a tendency to take personally employee complaints that question their actions. Training should be provided that includes recognizing protected complaints, how to respond to such complaints, and to whom the complaints should be reported.

Maintain Confidentiality: The anti-retaliation policy and the training should establish a protocol regarding to whom employees can turn with complaints and how supervisors and human resources should deal with those complaints. Among the most important procedural safeguards is the maintenance of confidentiality consistent with the need to conduct an investigation. If only a small number of people know about the complaint, the number of people who can be accused of retaliating is likewise small and will reduce the overall risk of such claims.

Take Care When Conducting Investigations: When an employee makes a protected complaint, the employee should be counseled that his/her complaint will not lead to retaliatory conduct. In addition, most employees who complain want to see results or, at the very least, a demonstration that their complaints have been taken seriously. It is important to consider carefully how complaints will be investigated, who will do the investigation, and how the complaining employee will be apprised of any developments.

Consider Timing: Courts will generally permit retaliation claims to be decided by a jury if the adverse action was at all close in time to the protected act. The closer in time the protected activity is to the adverse action, the more likely the claim will reach a jury.

Require Review Before Taking Adverse Action: Before terminating an employee or taking other adverse action against an employee who has engaged in protected behavior, employers should require a higher level review and/or consult with counsel to decide whether taking adverse action will expose the company to a potential retaliation claim.

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