How To Avoid Post-Employment Retaliation Claims — Part 1

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By now, most employers recognize that they cannot retaliate against their employees for engaging in protected conduct, such as making a complaint of discrimination or harassment, exercising their legal right to take time off for a covered reason, or reporting wrongdoing to the appropriate public agency. In fact, almost every federal employment statute includes an anti-retaliation provision. In the anti-discrimination context, retaliation claims are increasingly common.

Serving as a seemingly natural complement to an underlying claim of discrimination or harassment, retaliation claims were asserted in 44.5 percent of all U.S. Equal Employment Opportunity Commission charges filed last year — a percentage that has nearly doubled in the last 20 years. This increase is not surprising given the relative success of retaliation claims, which may be attributed to the ease of establishing a prima facie case of retaliation coupled with the fact that jurors almost seem to expect an employer to strike back against a challenging employee or one who accused the company of wrongdoing.

Knowing these risks, employers understandably feel like they are walking on eggshells when dealing with employees who have complained of discrimination or otherwise asserted their legal right, fearing that everything that happens thereafter could be perceived as retaliation. They often breathe sighs of relief when they finally part ways with a seemingly difficult employee. But, such sighs are premature. Employer liability for retaliation does not end when the employee leaves the company.

Because most anti-retaliation statutes have been interpreted to protect ex-employees, employers cannot let their guards down when responding to reference requests, deciding whether to challenge unemployment compensation or assert claims against a departed employee, or evaluating a former employee who has reapplied for employment. If adverse to the former employee, these and other post-employment actions can and will come back to haunt employers in the form of a retaliation suit.

In part 1 of this two-part series we'll discuss the recent increase in post-employment retaliation claims and two U.S. Supreme Court cases that have shaped the legal outlook for such claims. In part 2, we'll address the many different types of post-employment retaliation claims and how to avoid them.
The Expansion of Retaliation Claims in the Post-Employment Context

Regardless of the applicable statute, retaliation claims all stem from the same basic foundation — that an employee was subject to some adverse action by an employer because he or she took advantage of a legal right or complained about unlawful conduct. In the past two decades, the Supreme Court decided two cases that changed the legal landscape for post-employment retaliation claims under Title VII of the Civil Rights Act and similar statutes. First, in Robinson v. Shell Oil Company, 519 U.S. 337 (1997), the Supreme Court held that the term “employees” as used in Title VII’s anti-retaliation provision should be read broadly to extend protection to former employees. Like many post-employment retaliation claims, Robinson involved a claim by an ex-employee asserting that his former employer gave him a negative job reference in retaliation for his having previously filed an EEOC charge. A Maryland district court dismissed Robinson’s claim, finding that Title VII’s anti-retaliation provision applied only to current employees as the term “employee” is defined as a person “employed by an employer.” The Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court began its reasoning by concluding that the term “employees” in the statute is ambiguous because it contains no temporal qualifier and several provisions in Title VII use the term “employees” to mean something more inclusive than “current employees.” Concluding that the term “employee” was unclear, the court was left to resolve the ambiguity. According to the court, both the broader context provided by other sections of the statute and Congress’ intent when it passed the anti-retaliation provision support an inclusive interpretation of the protected class of “employees.” In fact, the statute plainly contemplates that “former employees will make use of the remedial mechanisms of Title VII” when asserting claims for retaliatory discharge, which inherently must be brought by former employees. Robinson, 519 U.S. at 345. Furthermore, the exclusion of former employees from protection would “undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.” Id. At 346.

Following Robinson, courts recognized retaliation claims by former employees, but many limited such claims to only those arising from adverse actions that impinge on the former employee’s future employment prospects or otherwise have a nexus to employment. See, e.g., Flannery v. Recording Industry Association, 354 F.3d 632 (7th Cir. 2004) (holding that the plaintiff stated a claim for retaliation where he was denied consulting work promised as part of a severance package because such denial had a sufficient nexus to his prior employment). However, in 2006, the Supreme Court issued a second opinion, which further expanded the scope of post-employment retaliation claims. In Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53 (2006), the court held that Title VII retaliation claims are not limited to discriminatory actions that affect the terms or conditions of employment. Instead, addressing a claim involving reassignment to an equal paying, but less desirable job, the court concluded that the act’s anti-retaliation provision covers any employer action that would be “materially adverse” to a reasonable employee or applicant, i.e., one which “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Burlington, 548 U.S. at 68.

The court reasoned that, unlike the substantive anti-discrimination provision, which precludes employers from discriminating against an employee “with respect to his compensation, terms, conditions or privileges of employment,” the anti-retaliation provision contains no such limiting qualifier. Where statutory wording differs, courts presume that lawmakers drafted such differences intentionally. According to the court, an anti-retaliation provision “limited to employment–related actions” would not accomplish Congress’ goal of maintaining unfettered access to the statute’s remedial scheme as it “would not deter the many forms that effective retaliation can take.” Id. at 64. In lowering the standard for “adverse actions” that can give rise to a retaliation claim, the Supreme Court significantly expanded the scope of Title VII retaliation claims and
opened the door to a much broader range of claims in the post-employment context in particular.

Although decided under Title VII, courts have routinely extended the Supreme Court’s reasoning in Robinson and Burlington Northern to other similar anti-retaliation provisions. For example, noting almost identical statutory language and intent, courts have held that the anti-retaliation provisions of both the Family and Medical Leave Act and the Fair Labor Standards Act protect former employees. See, e.g., Smith v. BellSouth Telecommunications Inc., 273 F.3d 1303, 1307 (11th Cir. 2001) (holding that a former employee who was denied re-employment because he previously took FMLA leave could proceed on his FMLA retaliation claim); Darveau v. Detecoin Inc., 515 F.3d 334, 342 (4th Cir. 2008) (concluding that the FLSA protects former employees from retaliation).[1]

Former employees have likewise been successful in pursuing retaliation claims against their former employers under a variety of state anti-retaliation laws. See, e.g., Roa v. Lafe, 200 N.J. 555, 574-575 (2010) (finding that the defendant’s post-employment termination of its former employee’s health insurance was actionable as retaliation under the New Jersey Law Against Discrimination); Psy-Ed Corp. v. Klein, 459 Mass 697 (2011) (holding that a former employee could bring a retaliation claim under the Massachusetts Fair Employment Practices Act); Liverpool v. Con-way Inc., 2009, at *12 (E.D.N.Y. May 15, 2009) (concluding that Section 215 of New York’s Labor Law prohibits retaliatory discrimination against former employees).

Because most retaliation statutes are interpreted liberally — both in terms of who and what they protect — employers must be cautious in their dealings with employees who engaged in protected conduct even long after their separation dates.

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[1] While most courts have held that the anti-retaliation provision of the False Claims Act does not protect post-employment conduct, this is due to the express language of the provision, which unlike many other anti-retaliation statutes, limits its scope to discrimination “in the terms and conditions of employment.” See, e.g., Master v. LHC Group Inc., 2013 WL 786357 (W.D. La. March 1, 2013) (finding that section 3730 of the False Claims Act does not provide a remedy for post-employment retaliation). Notwithstanding its narrower language, some district courts have determined that post-employment retaliation claims may be cognizable under the False Claims Act in certain circumstances. See, e.g., Fitzsimmons v. Cardiology Association of Fredericksburg Ltd., 2015 WL 4937461, at *7 (E.D. Va. Aug. 18, 2015) (holding that a former employee may be able to state a claim for retaliation under the False Claims Act where he was denied post-termination payments due under his employment agreement, which set the “terms and conditions” of his employment).