

Using Patience and Other Virtues to Avoid Retaliation Claims

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2015

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HANDLED MATTERS IN **40** STATES AND DC

MORE THAN **90** COLLECTIVE
ACTIONS
IN THE LAST
SEVERAL YEARS



> 630
FEDERAL COURT CASES
IN LAST THREE YEARS



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**THIRD, FOURTH, FIFTH,
SIXTH, ELEVENTH AND**
DISTRICT OF COLUMBIA CIRCUIT COURTS
OF APPEAL IN LAST THREE YEARS



APPEARED IN
22 DISTRICT
COURTS
AS WELL AS THE
DISTRICT OF COLUMBIA
IN LAST **THREE** YEARS



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BEST LAWYERS



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TOP-RANKED
IN **8** CITIES

22 ATTORNEYS LISTED IN
SUPER LAWYERS
PLUS 15 RISING
STARS



ROADMAP

- Identify specific sources of retaliation risks, specifically the laws that prohibit retaliation and protect employees.
- Examine briefly the extent of the retaliation risks present with each statute or law.
- Review fundamental elements of a retaliation claim.
- Best practices for avoiding retaliation.

Basic Definitions – Implied Malice?

- Webster's defines retaliate as follows: "to repay (as an injury) in kind; to return like for like; *to get revenge.*"
- WordNet defines it as "take revenge for a *perceived wrong.*"

Food for Thought



	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Retaliation - All Statutes	22,768	22,690	22,740	22,278	22,555	26,663	32,690	33,613	36,258	37,334	37,836	38,539	37,955
	27.00%	27.90%	28.60%	29.50%	29.80%	32.30%	34.30%	36.00%	36.30%	37.40%	38.10%	41.1%	42.8%
Race	29,910	28,526	27,696	26,740	27,238	30,510	33,937	33,579	35,890	35,395	33,512	33,068	31,073
	35.40%	35.10%	34.90%	35.50%	35.90%	37.00%	35.60%	36.00%	35.90%	35.40%	33.70%	35.3%	35%
Sex	25,536	24,362	24,249	23,094	23,247	24,826	28,372	28,028	29,029	28,534	30,356	27,687	26,027
	30.20%	30.00%	30.50%	30.60%	30.70%	30.10%	29.70%	30.00%	29.10%	28.50%	30.50%	29.5%	29.3%
Disability	15,964	15,377	15,376	14,893	15,575	17,734	19,453	21,451	25,165	25,742	26,379	25,957	25,369
	18.90%	18.90%	19.40%	19.70%	20.60%	21.40%	20.40%	23.00%	25.20%	25.80%	26.50%	27.7%	28.6%
Age	19,921	19,124	17,837	16,585	16,548	19,103	24,582	22,778	23,264	23,465	22,857	21,396	20,588
	23.60%	23.50%	22.50%	22.00%	21.80%	23.20%	25.80%	24.40%	23.30%	23.50%	23.00%	22.8%	23.2%
National Origin	9,046	8,450	8,361	8,035	8,327	9,396	10,601	11,134	11,304	11,833	10,883	10,642	9,579
	10.70%	10.40%	10.50%	10.70%	11.00%	11.40%	11.10%	11.90%	11.30%	11.80%	10.90%	11.4%	10.8%
Total Charges	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922	99,947	99,412	93,727	88,788



Retaliation claims have surpassed all other types of claims in EEOC Charges since 2008, and the numbers continue to grow.

Source: <http://eoc.gov/eoc/statistics/enforcement/charges.cfm>

Retaliation on the Rise



The number of Title VII retaliation claims filed with the EEOC has gone from 16k in 1997 to 30.8k in 2014.

- In 2014, 42.8% of all charges filed with the EEOC included a retaliation claim.
- Retaliation claims are the second most asserted Title VII claim behind only race discrimination.

Sources of Retaliation Risks

**Common Laws
Prohibiting Retaliation**

Title VII

- Race
- Sex
- National Origin
- Religion
- Color
- Compensatory and punitive damages
- Protects opposition and participation conduct

42 U.S.C. § 1981

- Ensures equal rights to make and enforce contracts, regardless of skin color
- Employees can bypass Title VII safeguards
- EEOC Charge filing NOT a prerequisite under section 1981
- Encompasses retaliation for race claims

Age Discrimination

- 40 or older
- No compensatory or punitive damages
- Protects opposition and participation conduct



Disability Discrimination



- Actual/perceived disability
- Compensatory and punitive damages

The ADA has 2 retaliation provisions

- Opposition/Participation
- Prohibit Interference, Coercion and/or Intimidation

And the list goes on.....

- Fair Labor Standards Act
- Family Medical Leave Act
- Sarbanes-Oxley



And On.....

- **Workers' compensation**
- **Jury duty**
- **State Law Discrimination Statutes**
- **State law whistleblower**



Standard (under Title VII)

- *McDonnell Douglas* Burden Shifting Test
- To establish a *prima facie* case of retaliation, Plaintiff must demonstrate that:
 1. She **engaged in activity protected** by Title VII;
 2. The employer took **adverse employment action** against her; and
 3. A **causal connection exists** between the protected activity and the adverse employment action.

Standard (Continued)...

- If the plaintiff successfully presents a *prima facie* case, the burden shifts to the employer to provide a **“legitimate, non-retaliatory reason** for the adverse employment action.” *Long v. Eastfield Coll.*, 88 F.3d 300, 304–05 (5th Cir. 1996) (citation omitted).
- Plaintiff “must respond to [the employer’s] alleged non-retaliatory reason for her termination and show that the retaliation was a **“but for” cause of the adverse employment decision.** *Babin v. National Vision*, 2012 WL 6177134 (5th Cir. 2012).

Good News

- In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that the more stringent standard applies.
- Previous standard
 - Could arguably prove retaliation by proving the protected activity was a “motivating factor” or a “substantial contributing cause”

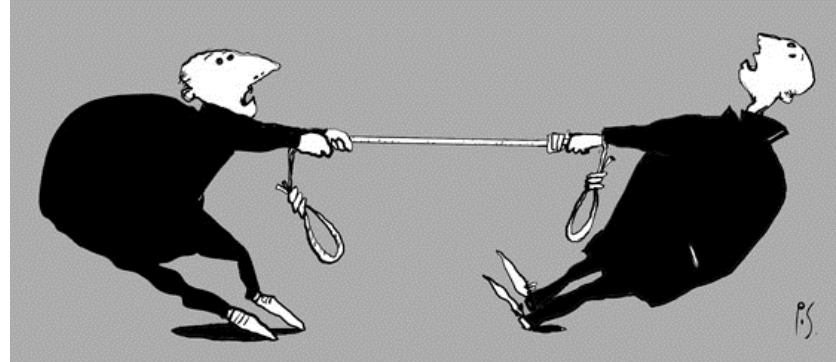
Not anymore...

Nasser – “But For” Causation

- Facts
 - Middle Eastern physician – proved retaliation at trial
- Standard
 - Title VII retaliation claims must be proven according to the traditional principles of but-for causation, which requires “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”
 - Based on text of 1991 amendments “because” and potential abuse of retaliation claims

Protected Conduct

- Opposition



- Participation



What Constitutes Adverse Action?

- Discharge
- Demotion
- Reduced Compensation
- Suspension
- What else?



Supreme Court holds:

- *More onerous* than discrimination standard.
- “Materially adverse:” **sufficient to dissuade reasonable employee/ applicant in complainant’s situation from making or supporting a complaint.**

Burlington Northern, 548 U.S. 53 (2006).

But still.....

- The purpose of this objective standard is “to separate significant from trivial harms” and “filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Id.*
- Even when an adverse action is intended by the employer as retaliation, **it must still satisfy this materiality standard.** *Id.* at 67-68.
- The courts’ role is not to serve as a “super personnel department” that second guesses employers. *See, e.g., Hedrick v. Western Reserve Care System*, 355 F.3d 444, 462 (6th Cir. 2004); see also, *Moss v. BMC Software, Inc.*, 2010 WL 2633062, at *11 (5th Cir. July 2, 2010).

Examples

- **Transfer (even if no loss/ reduction in pay)**
 - Secretary who complained boss was sexually harassing her moved to another, less prestigious position (not working for town's highest executive) at same pay rate and benefits
 - Reassignment of important client account
- **Suspension (even if paid)**
 - Placed on paid, administrative leave after taking FMLA leave
- **Change of job duties (even if within job description)**
 - Temporary reassignment to project depriving supervisor of authority
 - Administrator's loss of decision making discretionary authority

Stewart v. Mississippi Transportation Commission

- The plaintiff complained that the following retaliatory actions were taken against her:
 - personal items were taken from her desk;
 - the locks on her office had been changed, and she was not allowed to close her office door;
 - and she was chastised by superiors and ostracized by co-workers.
- 586 F.3d 321, 331-32 (5th Cir. 2009).
- Held: each of these complaints “do not rise to the level of material adversity but instead fall into the category of ‘petty slights, minor annoyances, and simple lack of good manners’ that the Supreme Court has recognized are not actionable retaliatory conduct.” *Id.* at 332.

Also found insufficient....

- Allegations of:
 - Unpleasant work meetings;
 - Verbal reprimands;
 - Improper work requests; and
 - Unfair treatment.
- *King v. Louisiana*, 294 Fed. Appx. 77, 85, 2008 WL 4326493, at *6 (5th Cir. Sept. 23, 2008).

Complaints Should Not Fully Insulate Employees

- “[T]he mere fact that some adverse action is taken after an employee engages in some protected activity will not always be enough for a prima facie case Title VII’s protection against retaliation does not permit EEOC complainants to disregard work rules or job requirements.”
- *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002).

Causal Connection?

- Plaintiff must also show the causal connection – i.e. that her “protected activity was a substantial or motivating factor for the adverse employment actions.” *McLaurin v. City of Jackson Fire Dep’t*, 2006 WL 3794348, at * 1 (Dec. 19, 2006).
 - Proximity in Time
 - Did the Decision Maker Know of the Protected Activity?

Proximity in Time

- The plaintiff argued that the three and a half month time span between her complaint and termination was “solid evidence” of retaliation.
- The Fifth Circuit responded to that argument as follows: “Our precedent lends no support whatsoever to [plaintiff’s] position. In fact, we have stated just the opposite. In *Roberson v. Alltel Information Services*, after noting that the defendant stated legitimate, nondiscriminatory reasons for firing the plaintiff, we held that “[w]ithout more than timing allegations ... summary judgment in favor of [the defendant] was proper.” *Id.* (citing 373 F.3d 647, 656 (5th Cir. 2004)) (emphasis added). The same result should be reached here.

Strong v. University Healthcare System, L.L.C., 482 F.3d 802, 807- 08 (5th Cir. 2007).

Did the Decision Maker Know?

- It is easier to show no causal connection if the decision maker was unaware of the protected activity.
- “Because there is no evidence in the record that those responsible for the adverse employment actions against [Plaintiff] were aware of her protected activity, [Plaintiff] cannot demonstrate the required *prima facie* causal link. . .”
- *Everett v. Central Mississippi, Inc. Head Start Program*, 2011 WL 4716317, *7 (5th Cir. 10/5/2011)

Cat's Paw Theory of Retaliation



- "[T]here can be situations in which the forbidden motive of a subordinate employee can be imputed to the employer because, under the circumstances of the case, the employer simply acted as the 'cat's paw' of the subordinate."
- *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997)

How it works....

- Typically, "statements by non decision makers, or statements by decision makers unrelated to the decisional process itself [do not] suffice to satisfy the Plaintiff's burden." *Price Waterhouse v. Hopkins*, 490 U.S. 227, 277 (1989) (O'Connor, J., concurring).
- Statements of non decision makers become relevant, however, when the ultimate decision maker's action is merely a "rubber stamp" for the subordinate's recommendation. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2001). Thus, "[i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker . . . it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Id.* at 226.
- *Rios v. Rossotti*, 252 F.3d 375, 382 (5th Cir. 2001).

Odds & Ends

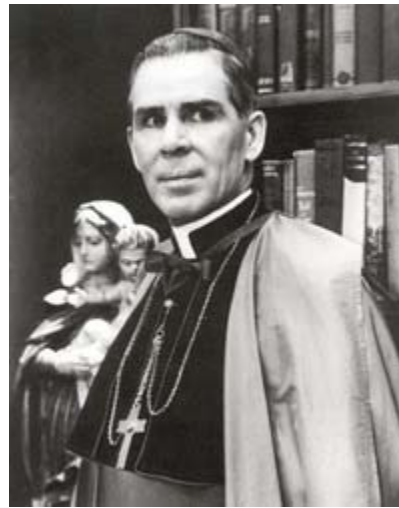
- Must the underlying complaint have merit?
- Is unreasonable conduct protected?
- Can a retaliation claim survive the termination of an employee's employment relationship?
- Are the relatives and friends of someone who participates in protected activity also protected from retaliation?

The Seven Virtues

- Patience
- Diligence
- Temperance
- Kindness
- Humility
- Chastity
- Charity

Patience

“Patience is power.
Patience is not an absence of action;
rather it is ‘timing’
it waits on the right time to act,
for the right principles
and in the right way.”
— [Fulton J. Sheen](#)



Patience

- *Why is "patience" a virtue? Why can't "hurry the heck up be a virtue?"*



Investigations

- Who should conduct the investigation?
- Who should be interviewed?
- What questions?
- Confidential?



NLRB's Take on Confidential Investigations

Non-union employers who have a practice or policy that prohibits employees from discussing ongoing internal investigations of workplace misconduct could be violating the National Labor Relations Act (NLRA).

What should employers do? Risk retaliation concerns or NLRB backlash?

- *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012)

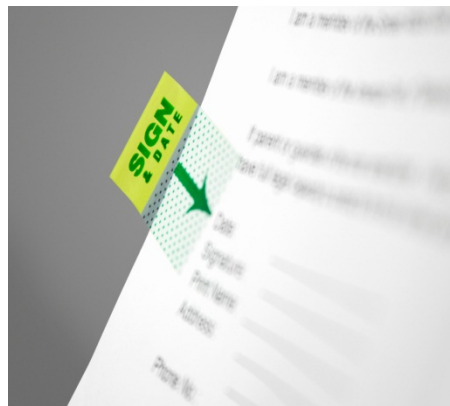
Diligence

*"Careful and persistent
work or effort."*

-The Web



How to Respond



Document, Document, Document

- Document all violations of policy.
- Document any investigation you do of injury/complaint.
- Document any light duty or alternative duty offered (comp), or action taken against the offender, or accommodation to remedy the complaint (discrimination or harassment).
- Emphasize to all involved that retaliation is prohibited.

Diligence

- Use progressive discipline
 - Warning
 - Final warning
 - Termination
- Be sure warnings and discharge are for objective reason and related to company policies (*e.g.*, not attitude but insubordination; not poor job performance but failure to perform specific tasks or meet certain criteria)
- Be as specific and objective as possible.

Diligence

- Apply your policies consistently.
- Document *appropriately*.
- Make sure reviews are accurate.
- Like warnings, reviews should be based on primarily objective criteria.

Diligence

- Have employee sign he or she received the warning or have a witness confirm the employee refused to sign
- If reviews are substantially lower after injury/protective activity, the reasons should be evident from the review
- Discharging an employee for poor job performance who has good reviews is asking for trouble

Temperance



Temperance

“Restraint, temperance, justice. Constant mindfulness of others and one's surroundings; practicing self-control, abstention, moderation and deferred gratification. Prudence to judge between actions with regard to appropriate actions at a given time. Proper moderation between self-interest, versus public-interest, and against the rights and needs of others.”

-- Wikipedia

Document, Document, Document

Allegation: They “papered my file!” = Adverse Action

See Kim v. Nash Finch Co., 123 F.3d 1046, 1066 (8th Cir. 1997):

- Prior to the plaintiff’s complaint, he “had received high performance evaluations and had had no disciplinary problems.”
- After his complaint, “he began to receive markedly lower performance evaluations;”
- Plaintiff “produced evidence that refuted the negative reports in his personnel file, including evidence that *Nash Finch* had ‘papered’ his personnel file with negative reports.”

Document, Document, Document

Allegation: They “papered my file!” NO Adverse Action

Irons v. Aircraft Service Intern., Inc., 392 Fed.Appx. 305 (5th Cir. 2010):

- The record is replete with instances of formal discipline spanning Irons’s time at ASIG. Moreover, even if the write-ups at issue were the first Irons had received, his argument is unavailing as he has adduced no evidence disputing the grounds upon which he was disciplined after engaging in protected activity. *See Newsome v. Collin County Cmty. College Dist.*, 189 Fed.Appx. 353, 356 (5th Cir. 2006) (unpublished) (deeming claims of false write-ups insufficient to create a genuine issue of material fact where party “did not introduce evidence to rebut any of the incidents for which she received a written warning”).

Document, Document, Document

Allegation: They “papered my file!” NO Adverse Action

See Babin v. National Vision, 2012 WL 6177134 (5th Cir. 2012):

- Plaintiff had many performance write ups pre- and post- protected activity. *She* claimed she was terminated because of reporting race discrimination.
- Court holds, “However, she never provides any evidence that the documents contain false characterizations of her on-the-job performance, and her conclusory assertions are not enough to survive summary judgment. (citing *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir.2010)).

Kindness

- Kindness encompasses compassion and friendship for its own sake. Empathy and trust without prejudice or resentment.
- --Wikipedia



KINDNESS

Kindness

- Monitor injured or complaining workers' reviews and attendance.
- Think long and hard before discharging an employee with a recent workers' compensation injury/protected activity (consider their written write up history)
- HR Director should ensure that lower-level managers are not giving unfair reviews to injured employees, or those engaging in protected activity.

Kindness

- If you have a good reason to discharge an employee, be sure the employee knows it.
- Conduct an Exit Interview that offers employee opportunity to reveal any problems or issues during their employment.

Humility

- To lower oneself in relation to another.
- “Peculiar . . . For one thing, it requires for its realization that we constantly do battle with, and insistently defeat, some of our strongest and deepest inclinations.”

-- Incharacter.org



Humility

- Ensure personnel decisions are well understood
- Provide opportunity for them to tell their side
- Do not make comments about the claim
 - “I see someone is trying to win the lottery”
 - “You’re not hurt that bad”
 - “Joe’s claim cost us our bonus checks”

Chastity



Chastity

- Separate the offender from the complaining employee
- Use a neutral decision maker
- Keep investigations as private as possible. A decision-maker that does not know of protected activity cannot retaliate.

Charity

- Charity as a virtue is not to be confused with the more restricted modern use of the word charity, which is to mean benevolent giving.
- Charity is self-sacrificial love for its own sake.

-- Condensed from various sources

Charity



Gambling



Questions? Discussion?

- Other examples?
- Other best practices?
- *Remember.* An employee's underlying claim may be without merit, but how the company handles it can put it at real risk for allegations of retaliation.