PUBLICATION

Why Can't We Be Friends? - The Expanding Scope of Third Party Retaliation Claims

March 26, 2014

Of all workplace discrimination claims employers are likely to face, retaliation claims top the list, comprising over one-third of all claims filed with the EEOC in recent years. The reason for their prevalence is that employees often raise such claims in conjunction with primary discrimination claims. Traditionally, discrimination claims were based on (1) alleged adverse employer action against an employee of a protected class (age, gender, disability, race, etc.), or (2) an employer action taken in retaliation against an employee based on that same employee's opposition to an unlawful practice. In recent years this later claim of retaliation has been generally extended to cover other employees that are related to the employee who opposes the unlawful practice. This is known as third-party retaliation.

Readers may recall that in 2011, the Supreme Court settled much controversy as to the viability of third-party claims, especially those based on Title VII of the Civil Rights Act, by holding in essence that "firing a close family member [of a complainant] will almost always" permit a claim for unlawful third-party retaliation, and that "inflicting a milder reprisal on a mere acquaintance will almost never do so." *Thompson v. North American Stainless*, LP, 131 S. Ct. 863 at 868 (2011). After the buzz surrounding Thompson faded, third-party retaliation may have slipped from some employers' radar. However, the field has continued to emerge based on different co-employee relationships and a myriad of federal and state statutes, many with slightly different language. Courts since Thompson have each had to perform their own independent factual analysis under various laws. It is important for employers to continue to monitor the continuing expansion of such claims.

For instance, a court in New Hampshire recently held that a co-worker relationship falling within "that gray area between a close friend and a casual acquaintance," was sufficient to allow a Title VII sexual-harassment-based retaliation claim to go forward, finding that the co-worker had aided the terminated employee in obtaining the employment, and that they had socialized outside of the workplace on occasion. EEOC v. Fuller Oil Co, Inc., Civ. Action No. 1:13-cv-295 (D.N.H., January 31, 2014). Also, in a recent Alabama case, a mere dating relationship was sufficient to allow a Title VII retaliation claim to continue. *Lard v. Alabama Alcoholic Beverage Control Bd.*, NO.2:12-CV-452-WHA, 2012 WL 5966617 (M.D. Ala., Nov. 28, 2012). Lastly, in Florida, a court held that spouses who were employed by different employers were within the class of persons protected by the Title VII's anti-retaliation provisions. There, the husband worked for a subcontractor of the wife's employer, and his physical workspace was at the wife's employer's facility. Based on these facts, the court found that retaliation may have occurred. *McGhee v. Healthcare Services Group, Inc.*, NO. 5:10-CV-279-RS-EMT, 2011 WL 5299660 (N.D. Fla., Nov 2, 2011).

Results may differ under other labor laws, however. For example, in Ohio a court denied a claim for retaliation against a relative of a FMLA claimant. The District Court judge reasoned that even though “the FMLA often borrows from Title VII jurisprudence, there are limitations” and that "[i]n contrast to Title VII, the FMLA delineates certain specific classes of individuals who may bring an action — those who have been denied a right protected by the Act ("interference" plaintiffs) and those who opposed an employer's unlawful action under the Act ("retaliation" plaintiffs). This, of course, reflects the narrower reach of the FMLA." *Gilbert v. St. Rita's Professional Services, LLC*, 2012 WL 2344583 at *6 (N.D. Ohio, June 20, 2012) (citation omitted).

In light of these developments, modern employers will have to do more than circulate an office dating policy to minimize the risk of third-party retaliation claims. The employer should always be aware of how taking an adverse employment action with respect to one employee may be viewed by a federal labor investigator (or worse, a federal judge!) as a reprisal for another employee's choice to exercise their federal employment rights.