What You Need to Know to Avoid Retaliation Claims

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Why Focus on Retaliation?

- Claims can be brought under a variety of both state and federal laws
- Broad scope of individuals may be protected
  - Former employees
  - Friends or relatives of employees
- Damages extended
  - Title VII and ADA – compensatory and punitive damages
  - SOX, Dodd-Frank, etc. – additional rewards

Why Focus on Retaliation? cont'd

- The number of retaliation claims continues to increase
- Retaliation claims are more likely to succeed than discrimination claims – may succeed even when underlying discrimination claim fails
  - Standard to prove retaliation lower than for discrimination
  - Human nature – considered natural to dislike employee who allegedly acted against employer

Retaliation 101

Elements of a Retaliation Claim

- Protected Activity
  - Participation
  - Opposition
- Adverse Employment Action
  - "Materially" Adverse Standard
- Causal Connection

Protected Activities – Participation

- Participation
  - Taking part in employment discrimination proceeding
  - Protected even if the proceeding involves claims that ultimately are found to be invalid
  - Protected even if proceeding involves a different entity
  - Examples:
    - Filing claim/filing lawsuit
    - Testifying
    - Assisting in investigation/hearing/proceeding
    - Requesting accommodation

Protected Activities – Opposition

- Opposition
  - Explicit or implicit communication that employer's actions are discriminatory
  - Need only establish "good faith, reasonable belief" that act opposed was unlawful – need not actually be unlawful
- Legitimate Opposition Activities:
  - Internal complaint of employer discrimination or threat to file charge/suit
  - Refusing to obey a discriminatory order
- Other types of activities

Adverse Employment Action

- *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), held a materially adverse action is:
  - Conduct that might dissuade a "reasonable employee" from making or supporting discrimination claim
  - Scope extends beyond workplace-related or employment-related retaliatory acts and harm
- Distinguished from type of adverse employment action needed to support discrimination claim

Adverse Employment Action, cont'd

- Significance of *Burlington Northern*
  - Increased retaliation claims – broader class of conduct may be considered retaliatory
  - Trivial conduct still not actionable, but "context matters" – relatively subjective standard
  - Summary judgment less frequent on issue of material adversity of actions (more jury trials)
  - Despite Supreme Court's attempt to provide objective standard, decisions on similar facts vary widely

Adverse Employment Action, cont'd

- Significance of *Burlington Northern*
  - Fifth and Eleventh Circuits only find actions resulting in direct economic harm to be materially adverse
  - Majority of Circuits (including Eighth) hold that actions resulting in indirect economic harm can also be materially adverse
  - Currently all Circuits are unwilling to extend standard to actions that could "potentially" result in economic harm

Basic Examples of Adverse Employment Action

- Materially adverse actions:
  - Termination
  - Reduction in pay
- May be adverse:
  - Change in hours/job conditions that do not affect pay or benefits, if harsher conditions, less-skilled, etc.
  - Giving a poor reference to future employer
- Not adverse:
  - PIP
  - Trivial annoyances

Causal Connection

- Demonstration that employment action is related to protected conduct
- Direct evidence:
  - Admission of unlawful reason for materially adverse action
  - Admission of bias
- Indirect evidence:
  - Usually demonstrated by temporal proximity
  - Disparate treatment of similarly situated employees

The Employer's Defense – McDonnell Douglas

- Burden-Shifting Analysis
  - Employee demonstrates prima facie case
  - Employer provides legitimate, non-discrimination reason for termination
  - Employee must then prove employer's reason is pretext

University of Texas Southwestern Medical Center v. Nassar (June 24, 2013)

- Redefined standard of proof for retaliation claim
- Nassar, who worked at both the University and a hospital, alleged his superior (Levine) made slurs regarding his ethnicity and discouraged him from seeking promotion
- Nassar complained to Levine's supervisor about harassment, and arranged to work only at the hospital, away from Levine
- Levine protested hospital's employment of Nassar, and hospital withdrew offer of employment

University of Texas Southwestern Medical Center v. Nassar (June 24, 2013), cont'd

- Fifth Circuit held that Nassar had proved that retaliation was at least a "motivating factor" in his discharge
- Supreme Court, however, found "motivating factor" test was inapplicable to retaliation claims
- In status-based discrimination claims (race, sex, religion, etc.), an adverse employment action can be based only in part on relevant status (exception: age)
- However, for retaliation claim, employee must prove that, **but for the retaliation, the adverse action would not have occurred**

University of Texas Southwestern Medical Center v. Nassar (June 24, 2013), cont'd

- Employer Takeaways
  - If employer made decision based even in part on legitimate reason, it may escape liability for retaliation
  - Raises factual showing required to defeat summary judgment – difficult for employee to get claim in front of jury
  - May help avoid claims in which employee asserts discrimination in anticipation of discipline or termination, and then claims event was retaliation for complaint

University of Texas Southwestern Medical Center v. Nassar (June 24, 2013), cont'd

- Employer Takeaways
  - May require employees to choose whether to pursue discrimination claim or retaliation claim at trial, reducing total number of retaliation claims
  - "But/for" standard likely to be the default in any federal antidiscrimination/retaliation law that does not explicitly allow for the "motivating factor" standard

Vance v. Ball State University (June 24, 2013)

- Explained standard to determine whether harasser is considered a coworker or a supervisor
- African-American employee alleged she was the victim of racial harassment
- Asserted employer was automatically vicariously liable for harassment because alleged harasser was supervisor
- Asserted alleged harasser had authority to control plaintiff's daily activities and evaluate performance

Vance v. Ball State University (June 24, 2013), cont'd

- Court affirmed Seventh Circuit's ruling that "supervisor" is someone with power to take tangible employment action, causing significant change in employee's employment status
  - Hire, fire, promote, reassign with different job responsibilities, or decision causing significant change in benefits
- Because alleged harasser in this case did not meet that standard, employer was not vicariously liable for harassing conduct

Vance v. Ball State University (June 24, 2013), cont'd

- Employer Takeaways
  - Whether or not employee is supervisor can likely be determined as a matter of law, early in case
  - Conduct by a coworker is less likely to lead to liability than the same conduct by a supervisor
    - *Vance* may therefore lead to fewer retaliation claims
  - Employers may avoid liability by clearly drafting job descriptions and delegating authority appropriately

Vance v. Ball State University (June 24, 2013), cont'd

- Employer Takeaways
  - If employer relies on coworker's recommendation in making an employment decision, employer may be vicariously liable for retaliation as though the coworker was a supervisor
  - Reminds employers/litigants that EEOC guidance may not be followed by courts
  - May leave opening for Congress to revise Title VII to include definition of supervisor

Materially Adverse Action: Constructive Discharge

Constructive Discharge Consequences

- Employer does not have to take an adverse action to face a discrimination/retaliation claim
- Employee can **quit** and claim constructive discharge
- Constructive discharge is an adverse employment action in discrimination cases or a materially adverse action in retaliation cases

Constructive Discharge Definition & Elements

- Employee must prove "the employer deliberately created intolerable working conditions with the intention of forcing her to quit." *Alvarez v. Des Moines Bolt Supply, Inc.*
- Intent can be proven with direct or circumstantial evidence if "employer could have reasonably foreseen" employee would quit as a result of its actions. *Fercello v. Cnty. of Ramsey*
- Must be objectively intolerable; "not the employee's subjective feelings" *Tatom v. Georgia-Pacific Corp.*

What is Objectively Intolerable? Ask Milton.

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Actions That Can Lead to Constructive Discharge

- Actions intended to demean or humiliate
  - Reassignment to a new position that is demeaning or that employee cannot perform. *See Parrish v. Immanuel Med. Cntr.* and *Sanders v. Lee County School Distr.*
- Actions intended to harass
  - Adding to job duties, repeated yelling for mistakes, withholding privileges allowed to others, dissuading employee from making complaints, etc. *See Baker v. John Morrell & Co.*

Examples of Employer's Actions That Could Contribute to Constructive Discharge

- Demotion
- Pay decrease
- Reduction in responsibility
- Reassignment to menial work
- Reassignment to younger supervisor
- Involuntary transfer to less desirable position
- Offer encouragement of early retirement
- Offer of continued employment on less favorable terms
- Threat of violence
- Threat of termination and/or demand for resignation

Actions That Generally Do Not Create Constructive Discharge

- *Howard v. Burns Bros., Inc.*
  - Being unfriendly or uncommunicative or giving the "cold shoulder"
- *Breeding v. Arthur Gallagher and Co.*
  - Expecting employees to meet job requirements
  - Giving a less-than-expected raise, or demotion, or transfer if justified
  - Inappropriate, but infrequent stray remarks

Employee's Obligations Before Quitting

- Employees must "act reasonably by not assuming the worst and not jumping to conclusions too quickly." *Breeding v. Arthur J. Gallagher & Co.*
- Thus, "constructive discharge claims ***fail as a matter of law*** where the employee has not given the employer a reasonable opportunity to correct the intolerable condition[.]" *Lisdahl v. May Foundation*
- This means a claim generally will exist if there is a "lack of recourse within the employer's organization." *Howard v. Burns. Bros., Inc.*

Employee Recourse As a Defense

- Employer may be able to avoid a finding of constructive discharge if it can show:
  - It has an ***effective*** complaint reporting procedure (e.g., Employer exercised reasonable care to prevent and promptly correct the claimed behavior)
  - Employee failed to use the reporting procedure (Employee unreasonably failed to take advantage of preventative or corrective opportunities)

Avoiding or Mitigating Constructive Discharge Claims

- Establish a complaint procedure for ***all*** complaints
- Post and get signed acknowledgments of procedure
- Respond properly and promptly to complaints
- Always act based on legitimate business interests
- Show meaningful desire to retain employee:
  - *Anda v. Wickes Furniture Co*.
  - *Quinn v. St. Louis County*

Milton's Complaint

Milton's Complaint

Preventing Retaliation Claims

- Establish a policy against retaliation
- Train supervisors and managers
- Communicate with the complaining employee
- Keep complaints confidential
- Document investigation process
- Review subsequent employment actions
- Have a second level of review

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Ms. Washkuhn, a litigation partner and head of the firm's national employment group, has extensive experience handling a variety of labor and employment matters across the United States. She has defended clients in single-plaintiff actions, multidistrict litigation and class actions, and she has litigated claims filed in various state and federal courts, including Nebraska, Iowa, Idaho, North Dakota, South Dakota, Colorado, Texas, Arizona, Illinois, Minnesota, Kansas and Missouri. Her significant litigation experience includes matters asserted under Title VII, the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Equal Pay Act, the Pregnancy Discrimination Act (PDA) and the Fair Labor Standards Act (FLSA), as well as similar state discrimination and wage payment laws.

Ms. Washkuhn's practice also focuses on litigating cases involving noncompete agreements, corporate raiding, misappropriation of trade secrets and breaches of fiduciary duties by employees, officers or directors. In addition, she has defended clients in ERISA and employee benefits litigation. Ms. Washkuhn also has significant experience arbitrating labor disputes, and she has handled employment arbitrations pending before FINRA, the AAA and the FMCS.