RETALIATION: MANAGING EMPLOYERS' #1 RISK (AND JURORS' FAVORITE CLAIMS)

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RETALIATION CLAIMS HAVE SURGED

RECOGNIZE AND MANAGE INCREASED (and unexpected) RISKS

To Retaliate

- *Get even*
- *Get back at*
- *Take revenge for a perceived wrong*
- *Avenge*
- *To return "like for like," especially "evil for evil"*

Illegal Retaliation – Overview

- Retaliation is a materially adverse action taken against an employee in response to protected activity.
- Three prongs to retaliation: (1) employee engaged in *protected activity*; (2) thereafter suffers *materially adverse action*; (3) demonstrates a *causal connection* between PA and AA.
- Applies to employees who *oppose discrimination, file a claim* or *exercise rights* under Title VII, ADEA, ADA, USERRA, FMLA, FLSA, Workers' Comp.
- Also applies to "whistleblowers" who *oppose* or *refuse to engage* in *illegal activity*.

Surge in Retaliation Claims

EEOC Statistics Tell the Tale

Fiscal Year	#of Claims	$$ Recovery in Millions
FY 1997	18,198	$41.7
FY 2002	22,768	$88.5
FY 2009	33,613	$133.8
FY 2012	37,836	$177.4

- Claims up 67% and recovery up 100% from 2002 to 2012.
- Claims up 13% and recovery up 33% from 2009 to 2012.

Why? Supreme Court's Expansive Decisions

1. *Burlington Northern v. White (2006)* – "materially adverse" action is one that "would dissuade a reasonable worker from making or supporting a charge of discrimination."
2. *CBOCS West v. Humphries* (2008) – Retaliation claims are actionable under 42 U.S.C. § 1981.
3. *Crawford v. Metro Gov't of Nashville* (2009) – expanded "opposition" protected activity to participants answering questions in an investigation.

Why? Supreme Court's Expansive Decisions

4. *Kasten v. Saint Gobain Performance Plastics Corp.* (2011) – a purely verbal complaint under FLSA is sufficient for protection.
5. *Thompson v. North American Stainless* (2011) – fiancé of complainant is within "zone of interests" protected from retaliation.
6. *Staub v. Proctor Hospital* (2011) – cat's paw liability.

What is the "Cat's Paw" Theory?

- The term "cat's paw" comes from the fable where a monkey convinces a cat to fetch chestnuts from a roasting fire. The cat burns its paw, while the monkey eats the chestnuts.
- According to the cat's paw theory, an action taken by a decision maker acting without discriminatory intent is unlawful IF he/she is INFLUENCED by someone who has acted with discriminatory intent.
- In legal terms, is the retaliatory action a "**proximate cause**" of the adverse action against the plaintiff? And if so, has there been any "**intervening superseding cause**" of the adverse action so as to negate the unlawful retaliatory motive?

The "Cat's Paw" Theory of Liability in Retaliation Cases

- Retaliation cannot happen by accident. By definition it must be intentional, so someone has to do it.
- In a Title VII case, the employer is liable if unlawful retaliation is a "motivating factor" in an adverse employment action. (This is not the case in an age discrimination case, where there must be "but for" causation.)
- In *Staub v. Proctor Hospital*, the U.S. Supreme Court ruled in 2011 that the "cat's paw" theory of liability applies in USERRA cases.
- This "cat's paw" theory is now being applied to Title VII retaliation cases, and makes it easier for a plaintiff to establish liability.

Additional Steps for Practical Application

- What is the challenged adverse decision?
- Who made the decision? Is there any evidence that he/she retaliated?
- Who had any influence into the decision? Is there any evidence that he/she retaliated?
- Whose actions "caused" the adverse action to happen? Is there any evidence that he/she retaliated?
- If there is any improper "taint," has there been an intervening superseding event to negate the effect of the "taint?"
- Make sure that investigations are truly independent and not influenced by anyone that could be accused of retaliating. The best way to do this is to make sure the decision maker has no knowledge of the protected activity.

What Can We Do To Minimize Liability?

- Ask the right questions and get to the bottom of what happened
- Identify everyone who has had any input or influence
- Determine whether any such person(s) could be vulnerable to an accusation of retaliation
- Conduct a truly independent investigation that removes the problem decision maker or influencer from the actual decision, and document the process undertaken

Good News

- *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (June 24, 2013)
- Vance worked in BSU catering division. Alleged racial harassment by Sandra Davis, a "catering specialist" who could lead and direct employee daily activities, but without authority to hire, fire, demote, promote, transfer, or discipline Vance.
- District Court held Davis was not a supervisor under *Faragher* and *Ellerth*; 7th Circuit and Supreme Court affirmed.
- Applies to sexual, racial, and other harassment forbidden by Title VII.
- Emphasis on finding a clear rule and rejection of EEOC's standard
- Why it matters whether the harasser is a "supervisor" . . . .

Vance v. Ball State, cont'd

- Because under *Faragher* and *Ellerth*:
  - If harasser is a coworker – employer is liable only if negligent in discovering or remedying the conduct.
  - If harasser is a supervisor – employer is strictly liable if the supervisor's conduct resulted in a tangible employment action. If not, it has *respondeat superior* liability subject to …
    - **AFFIRMATIVE DEFENSE:**
      - The employer exercised reasonable care to prevent and correct the harassment; and
      - The plaintiff unreasonably failed to take advantage of these preventive or corrective opportunities or to otherwise prevent harm
- Plaintiffs push "supervisor" to get strict liability or at least put the burden of proving affirmative defense to the employer

Vance v. Ball State, cont'd

- **What constitutes "tangible employment actions"?**
- To be considered a supervisor in a harassment case, the individual must be empowered to:
  - *". . . a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different, or a decision causing a significant change in benefits."*
- Reliance on dicta from *Ellerth* and *Faragher* in finding strong implication that the defining characteristic of a supervisor is the authority to take tangible employment actions

Vance criticism

- Employee groups argue unrealistic definition of supervisor:
  - makes it easier for employers to escape liability for actions of employees who actually have day to day authority over others
  - Ignores the conditions of the workplace

Employers: Take Five Steps to Protect Yourself From Retaliation Claims

1. Take the initial complaint seriously; perform complete investigation and document it.
2. Let complainant know, in writing, retaliation will not be tolerated.
3. Beware of temporal proximity.
4. Give complainant chance to shape up before taking adverse action.
5. Update management training to **focus** on retaliation.

Handling the Serial Complainer

- Treat each complaint separately
- Document each complaint and the Company's investigative steps
- Take a fresh look at each complaint
- Consider whether it's really protected activity
- If termination is warranted based on non-retaliatory reasons, evaluate the best time for terminating

Questions?