

## The Expanding Scope and Number of Retaliation Claims — How to Avoid Lawsuits and Minimize Risk

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Retaliation claims have increased dramatically in the last several years, rising for the first time to the largest category of claims filed with the Equal Employment Opportunity Commission (EEOC) in FY 2010. Such claims accounted for more than 36 percent of all EEOC charges filed in that year, compared to only about 29 percent of charges filed five years ago and 27 percent of charges filed a decade earlier. This significant increase in retaliation charges most likely is directly related to the United States Supreme Court's highly favorable treatment of retaliation claims in recent years. On January 24, 2011, the Supreme Court decided the latest of a number of retaliation cases in a manner favorable to employees asserting such claims. *Thompson v. North American Stainless*, No. 09-291, 2011 BL 17217 (U.S. Jan. 24, 2011).

Retaliation litigation derives most often from the provisions of Title VII of the Civil Rights Act of 1964. The statute makes it illegal for an employer "to discriminate against any of his employees ... because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has participated in any manner in an investigation, proceeding, or hearing under this title." 42 USC § 2000e-3(a). In addition to Title VII, numerous other statutes contain similar anti-retaliation provisions, including the Americans With Disabilities Act, the Age Discrimination in Employment Act, the

Fair Labor Standards Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act, and the Occupational Safety and Health Act, as well as so-called "whistleblower" protections in the False Claims Act and the American Recovery and Reinvestment Act of 2009, among others.

In *Thompson*, the Supreme Court addressed a Title VII claim brought by an employee who allegedly had been fired to retaliate against his fiancée for filing a charge of sex discrimination with the EEOC. The Court found that Title VII's anti-retaliation provision, which makes it "an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge" under Title VII, "must be construed to cover a broad range of employer conduct." 2011 BL 17217, at \*2 (citing *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006)). Thus, even though the plaintiff in *Thompson* had not himself made any charge or opposed any alleged discrimination before his firing, the Court had "little difficulty" in reaching the conclusion that, if his allegations were true, the employer's conduct violated Title VII. Relying on the standard enunciated in *Burlington* that the anti-retaliation provision precludes any employer conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," 548 U.S. at 68, the Court found it "obvious" that firing a worker's fiancé might very well

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dissuade the employee from engaging in protected activity. *Thompson*, 2011 BL 17217, at \*3. The Court also read the language in Title VII permitting a lawsuit to be brought by “the person claiming to be aggrieved” broadly, permitting “suit by any plaintiff with an interest arguably [sought] to be protected by the statutes” ... *Id.* at \*14 (citations omitted).

The expansive reading of the statutory provisions in *Thompson* follow the approach that the Supreme Court has pursued in regard to retaliation claims since at least the *Burlington* decision in 2006. In that case, the Court departed from previous decisions in the lower courts holding that employees who bring retaliation claims were required to prove that they suffered some “materially adverse change” in the terms and conditions of their employment, such as a discharge, demotion, loss of pay, or other significant change in status. Rather, the Court determined that it was sufficient for a plaintiff to show that a “reasonable employee would have found the challenged [employer] action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington*, 548 U.S. at 67-68. While the Court noted that the reasonable employee standard is an objective one, the determination of whether the challenged conduct would dissuade a reasonable employee involves consideration of the “context,” i.e., the circumstances of the specific employee. *Id.* at 68-69. For example, the Court observed that a schedule change might make little difference to most workers, but it may have a significant effect on a single mother with children of school age.

Likewise, the Court has rendered opinions in other retaliation cases in a manner that has made clear that the Court intends to broadly construe statutory provisions relating to retaliation so as to provide maximum coverage and protection. In 2008, in *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the Court determined that 42 USC § 1981, which guarantees African-Americans the right to make and enforce contracts “and the enjoyment of

all benefits, privileges, terms and conditions of the contractual relationship,” permitted a plaintiff to include a claim for retaliation despite the absence of any statutory language explicitly providing for such a claim. A year later, in *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 129 S. Ct. 846 (2009), the Court unanimously concluded that an employee “opposed” discrimination only as a result of comments made during an internal company investigation not initiated by the employee. The clear import of these decisions is that the Court will take an expansive view of statutory retaliation protections. The effect of this outlook and the much broader standard launched in *Burlington* now is being seen in the wave of retaliation charges and litigation reaching the EEOC and the Courts.

While most employers respect the anti-retaliation rights accorded in various statutes, recent changes in interpretations of these statutes not only have opened the floodgates for retaliation claims, but also have created substantial risk for employers dealing with those who have expressed concerns about perceived discrimination. These risks exist regardless of whether any actual discrimination occurred since an employee only need have a “good faith, reasonable belief that some violation occurred.” See, e.g., *Fantini v. Salem State College*, 557 F.3d 22, 32 (1st Cir. 2009). In addition, even “informal” complaints are sufficient to afford the employee protection. *EEOC v. Navy Federal Credit Union*, 424 F.3d 397, 406 (4th Cir. 2005). Moreover, since the Supreme Court in *Thompson* determined that an adverse action against a fiancé might dissuade a reasonable employee from engaging in protected activity, it also may be the case that adverse action against a paramour, a close friend, or a co-worker may have the same effect, depending on the particular circumstances.<sup>1</sup>

There are other reasons, apart from the changes in the law, why retaliation cases are increasing and are risky for employers. First, there are economic considerations. Employees who are swept into layoffs or are terminated and who have limited job oppor-

tunities elsewhere often look for avenues to claim they shouldn't have been discharged. Second, jurors in retaliation cases have a tendency to believe retaliation occurred and to empathize with employees who claim their employers retaliated against them. A desire to retaliate against someone who has caused problems or irritation is a normal human reaction. The easier legal standards applicable to retaliation claims make it imperative that employers handle situations, giving rise to potential retaliation claims – which now are far greater than before – promptly and effectively to protect themselves from claims that, in actuality, have no merit but which still pose high-stakes dangers, even inadvertently.

Although it is more common for retaliation suits to be filed after an employee is terminated, such claims can arise while the employee is still on the job – and this is the most difficult situation for employers. In such cases, the employee may claim that virtually every action the company takes thereafter constitutes retaliation. It is imperative that employers be aware of (and train their management employees to recognize) the scope of activity that may create protections under the statutory retaliation provisions and understand how to address these issues in a way that will prevent retaliation claims. It is crucial to understand the full facts of each possible situation *and* to evaluate what the impact of the employer's actions would be on a reasonable employee in those circumstances.

To avoid these onerous lawsuits, a company's best course of prevention lies in strong policies, EEO training for supervisors and HR staff, prompt investigations and evaluations for consistency, and documentation of all steps in the process. The following important steps can greatly minimize the risks to employers of unwanted and unwarranted retaliation claims:

**1. Policies** – Company policies that encourage all employees to prevent and to report discrimination and retaliation are important, including some rec-

ognition that employees should report any conduct that they reasonably believe to be wrongdoing. The policies should inform employees that such reports will not be considered inappropriate but, rather, are an essential element of creating the type of work environment that the company wants for all of its employees. The policies should mandate compliance with the requirements of the law and provide multiple avenues for reporting inappropriate behavior or actions.

**2. Education** – Employers need to educate not only the HR staff or others charged with conducting investigations, but also supervisors and managers. These educational efforts should include more than mere statements of what the law requires (for example, that discrimination and retaliation are prohibited), but also should include specific obligations of supervisors and managers in the event that an employee reports something (formally or informally) that relates to a protected area. Embed this training in your company's culture so that management employees recognize danger areas and signs.

**3. Investigations** – If an employee has made a complaint, employers should make certain that the claims are investigated promptly, thoroughly and fairly. Obtain outside advice regarding what investigation is appropriate, when necessary. The cases are filled with inappropriate statements by those investigating that end up supporting a claim for retaliation rather than ensuring the claim is defensible (for example, an investigator telling the complaining employee that the offending supervisor has a family and asking if the employee is sure that he or she wants to proceed has been found to establish the causation element for a retaliation claim). As part of the investigation, those conducting the investigation should meet with the appropriate supervisors and managers to ensure that they are aware of the complaint, know their obligations not to retaliate, and are directed to consult with HR regarding any performance or disciplinary matters, as well as to report any further complaints or comments regarding actions relating to the employee. Every witness

interview should begin with reiteration of the company's EEO policies and a statement that the company will not tolerate any retaliation for participation in the interview. Reach findings and conclusions promptly, communicate these to the employee and take any appropriate actions based on the findings and conclusions.

**4. Review of manager actions and consideration of reassignments** – If a management employee has been accused of wrongdoing, it is important to consider measures to make certain that the manager does not retaliate, intentionally or otherwise. This may include having the management employee's supervisor review all actions taken by the management employee that relate to the complaining employee and possibly having HR review significant actions. Any counseling or discipline certainly should be vetted in advance and should be provided to the complaining employee with at least one other management witness present. Great lengths must be taken to avoid creating any appearance that the complaining employee is being subjected to greater scrutiny than other employees or than what existed prior to the complaint, or that the employee is being "set up" or that his or her file is just being "documented." Appropriate consideration must be given to the particular employee's circumstances, including any facts that may make changes to assignments or actions taken against other employees close to the complaining employee seem significant and possibly retaliatory. Performance evaluations may be particularly difficult in these circumstances and significant effort is necessary to treat the complaining employee in the same way as if no claim had been made, i.e., not increasing criticisms or overlooking performance issues that actually may exist. Management personnel should be coached regarding what to say (and not to say) to the employee and to other employees, including having a script for any counseling or disciplinary meetings so that any statements that might be considered discriminatory may be avoided. Review of actions for consistency compared to how others in similar circumstances have been treated is essen-

tial; bear in mind that the longer any action against the employee occurs after a complaint, the less likely that action is to be considered retaliatory.

**5. Documentation** – Documentation of the complaint, the investigation (including instructions given to management personnel and witnesses), and any subsequent events, actions, or conversations of significance with the complaining party by management personnel is paramount. This should include positive interactions, as well as any further complaints or off-handed comments relating to the subject matter of the complaint or employment-related actions. All management personnel involved should be reminded that e-mail communications and other electronic data are discoverable in litigation and that comments or information that are inappropriate and that the management personnel would not want read in public should not be created. In any event, all documentation relating to the employee and the employee's claims must be preserved.

The watchword I leave you with is *caution*. Be attentive, and try to work out problem situations before they get out of hand. Consider the individual circumstances of any employee who has complained and ask yourself, "Would a reasonable person conclude that what we are about to do would dissuade that employee from complaining?" To prepare for the day when problems do arise, make sure the employer has the documentation necessary to defend the company's actions.

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<sup>1</sup> To establish a retaliation claim, an employee generally must show (1) that he or she engaged in some protected activity, (2) that the employee suffered some sort of materially adverse employment action (under the Burlington standard), and (3) a causal connection between the protected activity and the employment action.