

FEDERAL APPEALS COURT EXPANDS EMPLOYEE RETALIATION OPTIONS: 3 STEPS EMPLOYERS CAN TAKE TO PREPARE

Insights
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A federal appeals court recently expanded the set of options available to employees who bring retaliation claims against their employers or former employers. This major workplace discrimination decision from the 11th Circuit Court of Appeals could impact employers facing retaliation claims in Georgia, Florida, and Alabama. While the full scope of the October 27 decision has yet to take shape, you should be aware of the case and, specifically, of the potential it creates. This Insight will explain what happened in this case, how the court ruled, and three steps you can take to best prepare moving forward.

Mystery Phone Call Leads to Termination

Daphne Berry worked as a charge nurse in the emergency department of Crestwood Hospital in Huntsville, Alabama from 2007 to 2018. Ms. Berry was viewed as a reliable employee, receiving consistently high performance evaluations and noted by one supervisor as a leader of “the strongest and smoothest crew” in the emergency department. However, in February 2018, Ms. Berry was involved in an incident that set her termination in motion and ultimately led to a lawsuit against her longtime employer.

During her February 18, 2018, shift, video recordings revealed footage of Ms. Berry and her team acting inappropriately while providing care to a psychiatric patient, singing, dancing, and laughing in his room, with one nurse slapping the patient’s hand. After receiving a complaint about the nurses’ behavior allegedly from the patient’s family member, Crestwood investigated the nurses’ conduct

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and issued discipline, including a three-day suspension for Ms. Berry.

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However, Ms. Berry, who is Black, believed that a white co-worker made the call while claiming to be the patient's family member. She believed the co-worker put on the charade to have Black nurses fired. Ms. Berry lodged complaints to her supervisors, reported the suspected racial targeting to Crestwood's compliance hotline, and filed a grievance alleging that she was treated unfairly because of her race.

Crestwood conducted a thorough investigation of the emergency department based on the complaints lodged by Ms. Berry and others, as well as a noticeable uptick in department turnover. While their investigation did not substantiate who made the call about the nurses' misbehavior, investigators interviewed 24 individuals in the department, 16 of whom raised concerns about Ms. Berry. These reports identified her as a belligerent presence in the unit, bullying, yelling, and screaming at staff and causing at least seven employees to quit. Crestwood terminated Ms. Berry's employment, and Ms. Berry filed a suit alleging race discrimination and retaliation.

More Retaliation Options for Employees to Allege

Ms. Berry ultimately lost her case. An Alabama federal trial judge dismissed her claims because Crestwood conducted a sound investigation and could present legitimate reasons for her termination based on the interviews it conducted. The 11th Circuit Court of Appeals agreed with this outcome – but its decision is important because, even though Ms. Berry lost, the court opened up an additional avenue for future employees to argue that they were retaliated against.

Under the traditional 11th Circuit rule, when an employee claims that she was retaliated against and the employer counters that it has a legitimate reason for its actions, the employee must then prove that the employer's stated reason is false – in other words, that it artificially masks its "true" reason which was retaliatory. In this case, the 11th Circuit decided that, in addition to this framework, an employee can also prove retaliation without necessarily countering the employer's stated legitimate reason head on. In fact, the employee is permitted to prove retaliation using circumstantial evidence "**in any form**" that might create an inference of retaliatory intent.

So, while an employer can still rebut the circumstantial evidence presented, this decision clearly lays out the groundwork to effectively double an employee's arguments when attempting to establish retaliation. The employee is now welcome to argue *either* that the employer's stated reason for the termination (or other adverse action) is false, *or* that the employer's actions are enough to infer, on their own, that its motive was retaliatory. This means not only that more types of retaliation cases can develop, but also that employers will now be expected to be responsive to two kinds of arguments, likely increasing litigation costs.

3 Steps You Can Take to Prepare

The most important takeaway from this case is the need for you to maintain **vigilance** to head off retaliation claims before they arise and maintain best practices as soon as you suspect a retaliation claim is brewing. Here are three things you should consider as you redouble your compliance efforts in the face of increased retaliation arguments.

- 1. Increase trainings for all employees with managerial and/or supervisory authority.** Although Ms. Berry's case involved alleged retaliation after she was terminated, an employee can claim retaliation based on any adverse employment action. This can include demotion, transfer, discipline, or any change in the terms and conditions of employment. Because this 11th Circuit case opens the door for more potential evidence available to prove retaliation, it is essential that your decision-makers who might change an employee's terms and conditions understand and avoid the kinds of communications and actions that may give rise to an inference of a retaliatory motive.
- 2. Update policies, handbooks, and reporting procedures.** If your policies or handbooks include language about your company's reporting practices with accompanying guarantees of non-retaliation, it may be time to review those policies. While nothing has changed vis-à-vis your compliance obligations with federal or state law, it is even more important now that your employees know how to report discrimination, harassment, or any other reporting that will be deemed a protected activity against retaliation. And, if and when an employee does lodge a complaint to your Human Resources team or call an internal reporting hotline, make sure that nothing about

those processes can be construed to generate an inference of retaliation.

3. Document, document, document. If an employee files a complaint, make sure that your Human Resources team and anyone else involved in the complaint response document all communications with the employee and all subsequent actions and communications as the matter evolves. This can be a lot of work that may often seem repetitive, but it is essential that all of the actions, communications, and substantive decisions you make after the complaint is lodged appear unimpeachable. Because any circumstantial evidence of these decisions “in any form” can now be used against you at the earliest stages of retaliation litigation, you want to make sure that you maintain the best evidence documenting these decisions.

Conclusion

Fisher Phillips will continue to monitor workplace law developments and provide additional insights as needed. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information and invitations to our webinars. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Georgia or Florida offices](#).