KEMPSMITH LAW

150 YEARS

RETALIATION UPDATE

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RETALIATION CLAIMS

- Anti-Retaliation provisions common in employment-related statutes:
  - Title VII of the Civil Act
  - ADEA
  - ADA
  - FMLA
  - FLSA
  - Chapter 21 of the Texas Labor Code
  - Chapter 451 of the Texas Labor – workers' comp retaliation
  - Other state protections: jury duty; voting; nursing home employees who report violations of law; whistleblower statutes

RETALIATION CLAIMS

- Retaliation is the most common type of claim alleged in EEOC Charges
- In FY 2016:
  - 91,503 EEOC Charges filed
  - 45.9% (42,018) of Charges alleged retaliation
    - Compare to 2006 – 29.8% of Charges filed alleged retaliation
  - Race – 35.3%; Sex – 29.4%; Age – 22.8%; Disability – 30.7%

ELEMENTS OF A RETALIATION CLAIM

- *Prima Facie* Case of Retaliation
  - Employee engages in a protected activity
  - Employer takes adverse action against an employee
  - A causal nexus between the protected activity and the adverse employment action exists
- Standard of Causation → "But for"
  - Employee must prove that the adverse employment action would not have been taken when it was "but for" the protected activity
  - Stricter standard than discrimination claims

EEOC GUIDANCE ON RETALIATION

- Proposed Guidance
  - Released January 21, 2016 for public input – 30 days
- Final Guidance Published on August 25, 2016
  - Superseded 1998 Guidance
  - Explains how EEOC will investigate charges, make cause determinations, and views litigation
  - Broadly construes elements of a retaliation claims making it easier to conclude retaliation occurred → More lawsuits

EEOC GUIDANCE ON RETALIATION

- Elements of a retaliation claim
  - Employee engages in a protected activity;
  - Employer takes an adverse employment action against employee; and
  - Causal connection between protected activity and adverse employment action exists
- Nothing new here but EEOC broadly interprets these elements

EEOC GUIDANCE ON RETALIATION

- Protected Activity
  - Must occur before the adverse employment action is imposed
  - The decision-maker must have knowledge of it
  - Established by showing that the employee either "participated" in an EEO activity or "opposed" discrimination

EEOC GUIDANCE ON RETALIATION

- Participation Clause
  - Means filing a charge, testifying, assisting, or participating "in any manner" in an investigation, proceeding, hearing, or litigation under the law
  - Broad protection – even if underlying claim of discrimination is meritless or untimely, protection applies
    - Avoid chilling effect – witnesses more willing to testify if they don't have to pass "reasonableness test"
  - EEOC construes participation clause to apply to internal complaints too
    - Complaints to HR or a manager are protected
    - EEOC wants to encourage internal complaints without fear of retaliation regardless of merits
    - Not limited to EEOC investigations; participation in company investigation is protected

EEOC GUIDANCE ON RETALIATION

- Employees who invoke participation clause are not immunized from an otherwise appropriate adverse employment action
  - EEOC recognizes that employees can be disciplined for legitimate, non-retaliatory reasons even after engaging in a protected activity
  - Watered down – because new guidance broadens standard for proving retaliation
  - Example 1: Saleswoman with excellent performance appraisals is terminated after providing a witness statement to the EEOC in support of co-worker's harassment claim. Reason for the termination is failure to provide 48-hour advance notice to swap shifts. Because same-day notice was common-place and the close proximity of time between witness statement and termination, the EEOC finds cause.
  - Example 2: Female employee believed she was not promoted because of her gender and posted on Facebook: "anyone know a good EEOC lawyer?" Employer saw this and fired her shortly thereafter. No cause, however, because evidence showed she was fired for taking unauthorized OT.

EEOC GUIDANCE ON RETALIATION

- Opposition Clause
  - Protects individuals who oppose any unlawful employment practice
  - Applies if employee explicitly or implicitly communicates a belief discrimination may be taking place
  - No magic words or legal terminology required (i.e. "harassment" or "discrimination")
    - Must be enough to give employer reasonable notice
    - If complaint can be reasonably interpreted as opposition to discrimination, then complainant is protected.
  - Guidance expands reach of the opposition clause
    - Accompanying a co-worker to HR to file an internal EEO complaint
    - Complaining about discrimination directed at co-workers
    - Refusal to fire an employee if belief exists that the reason is discriminatory

EEOC GUIDANCE ON RETALIATION

- Opposition Clause cont.
  - Good news for everyone here: managers and HR personnel are protected even if opposing discrimination (i.e. taking prompt remedial action, reporting discrimination up chain-of-command, etc.) is part of their role
    - Rejection of the so-called "manager rule": required managers to step outside their management role and assume a position adverse to employer in order to engage in a protected activity
    - Provides protection to those best suited to stop discrimination in an organization

EEOC GUIDANCE ON RETALIATION

- Opposition Clause cont.
  - Complaints to someone other than employer such as union officials, co-workers, an attorney, law enforcement authorities are protected
    - Example: employee goes to police to report sexual assault against co-worker
  - Merely advising employer of intent to complain or file a charge – but not following through – is enough to constitute opposing discrimination even if matter is not actionable
    - EEOC says that reasonable opposition includes informing employer about potential discrimination or harassment even if harassment has not yet risen to level of severity or pervasiveness required to create a hostile work environment

EEOC GUIDANCE ON RETALIATION

- Opposition Clause cont.
  - What does the EEOC consider to be unreasonable opposition that would not warrant protection?
    - Complaints not involving discrimination or harassment
    - Example: complaints about work performance
    - Badgering a subordinate employee to provide a witness statement and coercing that employee to change her statement
    - Committing or threatening violence to life or property
    - Everything else is fair game!

EEOC GUIDANCE ON RETALIATION

- Opposition Clause cont.
  - Opposition must be based on a reasonable good faith belief that the conduct complained of violates the law – even if the conduct is not unlawful
    - Example: complaining of harassment that is not severe or pervasive
  - EEOC's goal is to encourage people complain even if they are wrong
    - It is employer's best interest for an employee to complain early about harassment before it reaches the point of creating a hostile work environment
  - Example of good faith belief: female employee who complains of sex discrimination after not being promoted and less-qualified male was selected
  - Example of complaint not motivated by a good faith belief: complaining female employee knew accounting job required a CPA license which she lacked and male individual selected had CPA license

EEOC GUIDANCE ON RETALIATION

- Other Examples of Protected Opposition
  - Complaints based on a legal position taken by EEOC even if not adopted by courts – complaining about sexual orientation discrimination is protected even though not unlawful under Title VII because of EEOC's stance
  - Complaining about graffiti in the restroom that is derogatory to women can be reasonably interpreted as a complaint of sex discrimination
  - A witness who corroborates information about harassment she witnessed or experienced is protected opposition even if she never complained
  - An employee who intervenes on behalf of a co-worker asking the harasser to stop is protected
  - Religious or disability-based requests for reasonable accommodation
  - Protected opposition even if protected activity involved different employer

EEOC GUIDANCE ON RETALIATION

- Adverse Employment Action
  - Any action that is materially adverse meaning that it would dissuade a reasonable person from engaging in a protected activity
    - Very broad interpretation
    - Includes but not limited to ultimate employment actions which apply to discrimination claims: hiring, firing, demotion, pay reduction, etc.
    - Does not include "minor annoyances," "petty slights," or "trivial" matters
    - Context matters – what might not be an adverse action to one employee might be one to another employee

EEOC GUIDANCE ON RETALIATION

- Adverse Employment Action cont.
  - Work-related actions: denial of promotion, suspension, discipline, negative evaluations, transfers to less prestigious job or work area, exclusion from work meetings necessary for advancement – almost anything that could impact the employee's standing in the company
  - Non-work-related actions: an action that causes the employee harm *outside* the workplace: altering schedule to interfere with single mother's ability to pick child up from school; filing a false report with government authorities; defaming person outside the workplace; giving an inaccurate job reference to a potential employer; threatening deportation or revoking visa to initiate action with immigration authorities; scrutinizing performance
  - The EEOC expressly states that courts that have found the above examples not to be adverse actions are flat wrong!

EEOC GUIDANCE ON RETALIATION

- Adverse Employment Action cont.
  - If employer's action reasonably likely to deter engaging in a protected activity, it can be challenged as retaliation regardless of harm
  - It is no defense that the employer's goal of deterring protected activity fell short
  - In short, pretty much anything that could be viewed as negatively affecting an employee – even in some minor way – is an adverse employment action according to the EEOC even if it has little to no tangible effect on terms and conditions of employment

EEOC GUIDANCE ON RETALIATION

- Third-Party Retaliation
  - When an employer takes a materially adverse employment action against an employee who engaged in protected activity by harming a third party who is closely associated with the complaining employee
    - Example: Company employs husband and wife. The wife complains of age discrimination, and company fires husband in retaliation for her complaint.
    - Example: Company punishes complaining employee by cancelling vendor contract with employee's wife's business.
  - The victim of third-party retaliation can sue too!
    - The victim of third-party retaliation (close friends, family members) can also bring a claim for retaliation even though he or she never engaged in a protected activity
    - Individual will have standing to sue if he or she was the intended target of the employer (within the zone of interests)

EEOC GUIDANCE ON RETALIATION

- Causal Connection
  - An adverse employment action is not unlawful unless the employer took the action *because* the employee engaged in a protected activity.
  - Employee must prove causal connection between the two events to sustain retaliation claim.
  - When employer provides a lawful reason for the action, the employee must discredit employer's reason to prevail.
  - If employer can show that the decision-maker did not know about the protected activity, then employee cannot prove retaliation

EEOC GUIDANCE ON RETALIATION

- Establishing the Causal Connection
  - New standard: "convincing mosaic" of circumstantial evidence that would support an inference of retaliation
    - Means that employee can rely on different "bits and pieces" of evidence which, in combination, are enough to show a retaliatory intent
  - Suspicious timing
    - Close proximity in time = easy to infer retaliation; long period of time won't disprove retaliation
    - EEOC says that even long periods of time such as 14 months may be enough if accompanied by evidence that employer kept mentioning the protected activity
    - One example cited by EEOC found retaliation by employee who had filed ADEA lawsuit 5 years earlier

EEOC GUIDANCE ON RETALIATION

- Establishing the Causal Connection
  - Verbal or written statements by the decision-makers showing inconsistencies, pre-determined decision, or the reason for the action is false
  - Comparative evidence
    - Similarly-situated employees who did not engage in protected activities were treated more favorably
    - Evidence that the employee had a higher performance rating before engaging in a protected activity
  - Inconsistent or shifting explanations in the employer's reasoning
  - Departure from employer's policies

EEOC GUIDANCE ON RETALIATION

- EEOC Best Practices to Minimize Retaliation Violation
  - Have a written anti-retaliation policy
    - Provide specific examples of actions that employees and managers may not have otherwise realized could be construed as retaliation
    - Provide steps for dealing with or minimizing interactions by managers and supervisors with employees who have asserted claims of discrimination against them
    - Describe avenues for reporting retaliation
    - State that employees who engage in retaliation can be subject to discipline, up to and including termination

EEOC GUIDANCE ON RETALIATION

- Training
  - Provide regular training to all employees on the written anti-retaliation policy
- Provide Anti-Retaliation Advice and Support to Employees, Managers, and Supervisors During and After EEO Investigation
  - Provide information to witnesses about anti-retaliation policy
  - Provide advice and support to persons who have been accused of discrimination so that they do not engage in conduct that could be viewed as retaliation
    - Provide guidance on how to handle personal feelings when carrying out management duties
  - Remind employees not to disclose or discuss an employee's pending EEO issue or complaint

EEOC GUIDANCE ON RETALIATION

- Proactive Follow-Up
  - Follow up with employees both during and after EEO investigation about actual or perceived retaliation
- Review Consequential Employment Actions to Ensure EEO Compliance
  - Ensure that an HR professional or other EEO specialist review employment decisions and underlying evidence before taking action
  - Make sure that evidence supports the decision and is based on a legitimate non-retaliatory reason

FIFTH CIRCUIT RETALIATION CASES

- *Fisher v. Lufkin Industries*, 847 F.3d 752 (5th Cir. 2017)
  - Fisher, a long-term African-American employee, claimed race discrimination when supervisor said "Boy, I don't know why every time I come over here it's a hassle" in reference to a machinery issue
  - Matter was investigated, with conclusion that "boy" was not intended as a racially derogatory term (Magistrate Judge agreed)
  - A month later, a white co-worker approached Fisher's supervisor to express dissatisfaction that Fisher had reported the supervisor over the "boy" incident and they discussed that Fisher had been selling pornographic DVDs out of his lunch box
  - Supervisor and co-worker then set up a "sting operation"
  - After an allegedly pornographic DVD was obtained from Fisher, another investigation occurred

FIFTH CIRCUIT RETALIATION CASES

- *Fisher*, cont'd
  - Ultimately Fisher was fired by VP of HR for violation of Company policy after VP read investigation summary prepared of sting operation
  - Trial court granted summary judgment for Lufkin, even though many Lufkin employees possessed pornography at work without issue and there was no clear work rule violated by Fisher; termination was justified because Fisher resisted the investigation (left before car could be searched) and lied about his activities (selling porn)
  - Fifth Circuit: Cat's paw applies – there would have been no investigation into Fisher's activities but for the retaliatory animus of the co-worker and supervisor

FIFTH CIRCUIT RETALIATION CASES

- *Cabral v. Brennan*, 853 F.3d 763 (5th Cir. 2017)
  - USPS letter carrier complained repeatedly of discrimination between 2012 and 2013
  - On September 9, 2013, after returning to work from a suspension for allegedly striking his supervisor with his mail truck, the plaintiff was placed on unpaid leave when he could not produce a valid driver' license, but was reinstated 2 days later and was reimbursed
  - The plaintiff sued for retaliation, claiming his unpaid leave was in retaliation for his earlier complaints
  - Trial court initially denied summary judgment but then granted
  - Fifth Circuit: under Burlington Northern v. White, 2-day unpaid leave was not a materially adverse action

FIFTH CIRCUIT RETALIATION CASES

- *Alkhawaldeh v. Dow Chemical*, 851 F.3d 422 (5th Cir. 2017)
  - In October 2009 the plaintiff (a Jordanian Muslim Arab) received lowest possible rating on evaluation and was placed on PIP
  - One month later, the plaintiff complained to his supervisor that two coworkers made racially insensitive remarks during a training session, to which his supervisor allegedly said "when you come from the part of the world you come from, there's a perception and perception is reality"
  - In the summer of 2010, the plaintiff was transferred to a different supervisor and workgroup. The new supervisor evaluated the plaintiff as an underperforming employee. He was terminated in October 2010
  - Trial court granted summary judgment
  - Fifth Circuit: No reasonable fact-finder could find "but for" causation. Poor performance is not protected activity under Title VII.

TEXAS RETALIATION CASES

- *McNeel v. Citation Oil & Gas*, 2017 WL 2959822 (Houston July 11, 2017)
  - In 2011 McNeel, a CPA, complained that her supervisor made negative comments about women's weight (but not hers), yelled, and coughed excessively
  - In January 2012, she complained that the same supervisor said he would "kill himself" over his employees' work errors
  - While she worked for Citation, McNeel formed an oil and gas consulting side business and did not disclose to Citation, but when Citation learned of it in March 2012, it terminated her for conflict of interest
  - She sued for retaliation, claiming the real reason for her termination was her report of her supervisor's conduct

TEXAS RETALIATION CASES

- *McNeel*, cont'd
  - Court of Appeals: First, McNeel never explained how the conduct was discriminatory, but even construing it as "sexual harassment" no reasonable person would believe that the supervisor's conduct amounted to sexual harassment

TEXAS RETALIATION CASES

- *Henry v. Doctor's Hosp.*, 2017 WL 1549230 (Corpus Christi April 2017)
  - Nurse claimed she suffered an adverse employment action when she was demoted from Level III to Level II nurse, after some type of protected activity
  - Hospital claimed this was a transfer and came with same pay, benefits, opportunities
  - Nurse said there was a loss of prestige going from Level III to Level II
  - Court: No evidence, other than subjective belief of how Level II was viewed, of an adverse employment action; thus no evidence summary judgment properly granted