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2010: The Year of Retaliation?

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On January 6, 2010, the Equal Employment Opportunity Commission (EEOC) released its enforcement and litigation statistics for fiscal year 2009. For the first time in history, retaliation claims are now tied with race discrimination claims as the most common charge filed with the EEOC. Historically, race discrimination claims have led all other types of discrimination claims. These statistics confirm the need for a renewed emphasis on supervisor training and education.

What is retaliation?

As humans, we have a natural tendency to want to or to actually lash back against someone who has accused us of wrongdoing. This natural tendency is particularly dangerous for supervisors who have been accused by their employees of wrongdoing. Retaliation occurs when an employee engages in protected activity (such as reporting an illegal, unsafe or unethical act or participating in an investigation about a reported illegal, unsafe or unethical act) and subsequently suffers an adverse employment action that is causally connected to the protected activity. An adverse employment action is not limited to discipline or discharge, but includes any materially adverse action that would dissuade a reasonable employee from making or supporting a

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charge of discrimination. Common examples of adverse employment actions include demotions, withholding of pay increases, a reduction in job responsibilities, disciplinary action, increased surveillance or monitoring, and poor performance reviews.

Changing Trends in Federal Employment Laws

In the past three years, the United States Supreme Court has demonstrated an increasingly broad interpretation of statutes containing anti-retaliation provisions. In *Gomez-Perez v. Potter* the Court read into the Age Discrimination in Employment Act of 1976 (ADEA) a proscription against retaliation despite the fact that the ADEA contains no federal sector anti-retaliation provision. The Court reaffirmed that "[r]etaliation . . . is another form of intentional discrimination," suggesting that anti-retaliation prohibitions will be read into other anti-discrimination statutes, regardless of whether they are specifically included.

Similarly, in *Burlington Northern & Santa Fe Railway Co. v. White* the Supreme Court liberally interpreted "[t]he scope of [Title VII's] anti-retaliation provision [to] extend beyond workplace-related or employment-related retaliatory acts and harm." That is, despite the fact that a claim of discrimination under Title VII must be based upon "actions that affect employment or alter the conditions of the workplace," a claim of retaliation under Title VII can be based on conduct that does not necessarily occur in the workplace.

In *Crawford v. Metropolitan Government of Nashville* (discussed in a subsequent article on our web site), the Court adopted a liberal interpretation of the protections established by the anti-retaliation provisions of Title VII. And most recently, on December 14, 2009, the Court invited the Justice Department to file a brief in *Thompson v. North American Stainless*, a case involving the question of whether a third party is protected by the anti-retaliation provisions of Title VII, based solely on his association with an employee who engaged in protected activity.

The message sent by the Supreme Court with these particularly expansive readings of federal employment discrimination statutes has been well received by the lower courts and the EEOC. Following the Supreme Court's lead, federal courts have likewise demonstrated an expansive approach to evaluating retaliation claims. In *Hawkins v. Anheuser-Busch, Inc*., the Sixth Circuit Court of Appeals (which includes Michigan and Ohio), joined the majority of other circuit courts in determining that Title VII protects against coworker retaliatory harassment that is known to but not restrained by the employer.

In *Hawkins*, an Anheuser-Busch employee alleged that a fellow co-worker who had been harassing her set fire to her car (at her home) in retaliation for her report of harassment. The Court, relying on *Burlington*, commented that the scope of Title VII's retaliation provision is broader than that of Title VII's anti-discrimination provision. Specifically, the Court observed that in contrast to Title VII's anti-discrimination provision, the "adverse employment action" requirement in the retaliation context is not limited to an employer's actions or only to actions that occur at the workplace. Accordingly, the Court held that employers now can be liable for the retaliatory actions of coworkers, even if those actions take place off of the employer's premises, if the employer manifests indifference to the coworker's behavior.

The EEOC also has taken an aggressive approach to combating retaliation claims. Most recently, it filed suit against a New York steakhouse for male-on-male sexual harassment and retaliation. According to a December 31, 2009 EEOC press release, the male managers and employees at Sparks Steak House subjected other male employees to ongoing abuse, including physical touching and crude comments. One employee complained about the harassment and his complaints were either ignored or resulted in punishment. The EEOC stated that it "is sending the message that this type of behavior is illegal and will not be tolerated."

The lessons from these cases are important. Employers are facing increasing liability for behavior in the workplace (and in some cases, even outside of the workplace), regardless of whether the undesirable behavior is engaged in by supervisors or coworkers. These cases necessitate a review of employer policies on harassment and retaliation, which should be broad enough to protect against all forms of harassment and provide detailed reporting provisions for complaints of any inappropriate behavior. Perhaps most significantly, these cases demonstrate that supervisor training and education is an indispensable component to avoiding retaliation and preventing retaliation complaints. Employers should contact legal counsel to ensure their policies and training programs are developed in a manner to best insulate them from liability.

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