MANAGING EMPLOYEES WITHOUT FEAR OF RETALIATION CLAIMS

Fredric C. Leffler and Thomas A. McKinney

Retaliation claims present a growing source of potential liability for employers. Federal, state, and/or city anti-discrimination laws invariably contain provisions prohibiting retaliation against individuals who have filed discrimination charges, participated in court or administrative agency proceedings concerning a discrimination charge, or who opposed practices made unlawful under anti-discrimination statutes. In the last decade, the filing of retaliation claims has mushroomed. Statistics compiled by the Equal Employment Opportunity Commission (EEOC) show that the number of federal retaliation claims *rose* nearly sixty-one percent between 1993 and 2002, while the total number of federal civil rights discrimination claims filed actually *decreased* over the same time period.[1] Whereas, in 1993, a total of 87,942 charges were filed with EEOC of which 13,814 were retaliation claims, by 2002, of the 84,442 total charges filed that year with EEOC, the number of retaliation claims had climbed to 22,768 — fully 25 percent of EEOC's caseload.

Today, aggrieved employees usually append a charge of retaliation to their discrimination charges. To the chagrin of many employers, it is not uncommon for courts or juries to reject the discrimination claim while, simultaneously, finding that the management team unlawfully retaliated against the complaining employee. Losing a retaliation suit has serious monetary consequences for an employer because the company then faces the prospect of a jury award of punitive damages, if jurors believe that company managers or supervisors acted with malice or reckless indifference to the employee's rights. Not surprisingly, the EEOC encourages punitive damages awards for retaliation claims, explaining that "[p]roven retaliation frequently constitutes a practice undertaken with 'malice or with reckless indifference to the federally protected rights of an aggrieved individual,' [t]herefore, punitive damages often will be appropriate in retaliation claims."[2]

In one case, *Jin Ku Kim v. Nash Finch Co.*,[3] the jury found that the employer engaged in unlawful retaliation and, as a result, awarded the aggrieved employee seven million dollars in punitive damages. Although the United States Court of Appeals for the Eighth Circuit reduced the amount of punitive damages awarded in accordance with the federal statutory caps set

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FREDRIC C. LEFFLER is Senior Counsel at Proskauer Rose LLP and Senior Editor of HR Advisor. His practice is devoted to the representation of employers exclusively, including litigation in federal and state courts, and before administrative agencies. A frequent lecturer and writer on a wide variety of labor and employment law issues, Mr. Leffler regularly counsels employers on how to avoid employment litigation through training.

THOMAS A. MCKINNEY, a graduate of Cornell University's School of Industrial and Labor Relations, and a Summer Associate at Proskauer Rose LLP, expects to obtain his Juris Doctor's degree in December 2003 from the University of Pennsylvania Law School. Following graduation, he will join Proskauer's Labor and Employment Law Department.

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forth in 42 U.S.C.A. § 1981a, the court affirmed the jury's finding. Had Kim been resident in a locality with a state or city law permitting the recovery of unlimited punitive damages and made a claim under that law, it is possible that the appellate court would not have reduced the amount of punitive damages found by the jury.

Accordingly, retaliation claims are not merely an extra box to check on an EEOC or state FEP agency charge form. Given their propensity and the potential for large monetary damage awards, it is imperative that employers be mindful of the various retaliation statutes, the circumstances that give rise to retaliation charges, and best practices to avoid potential retaliation claims. The simple act of filing a discrimination claim does not provide an employee insulation from discipline for absenteeism, shoddy performance, or acts of misconduct. Those employees still must be managed. The trick is doing so without triggering a valid retaliation claim. Beyond cavil, employers can develop successful strategies for managing discrimination complainants, while avoiding retaliation claims; but it requires documentation, patience, communication, adherence to company policies, and good judgment.

What follows in this article is a road map to assist your organization in managing employees without fear of retaliation claims. Not only do we explain the existing legal environment in which retaliation claims arise today, we identify some employee behaviors that transgress the line of *protected activity*, describe employment actions taken by employers that have been deemed adverse, and discuss strategies to prevent retaliation claims.

PRACTICE GUIDE: Employers should promulgate an effective anti-retaliation policy and provide training in this area to managers and supervisors. The policy may be part of the employer's anti-discrimination and/or anti-harassment program, which should be posted and distributed to each manager, supervisor, and employee. There should be a written record that the policy was distributed to each employee; and the policy should be redistributed annually. As with the company's anti-discrimination policy, the anti-retaliation policy should establish a complaint mechanism with multiple avenues for receipt of complaints to limit the possibility of retaliation. Employees who make any type of discrimination or harassment complaint should be advised of the anti-retaliation policy. When investigating discrimination or harassment complaints, complainants and interviewees should be reminded of the no-retaliation policy. Finally, managers and supervisors must be trained to refrain from conduct that can be perceived as retaliatory. Equally important, managers and supervisors must be trained in techniques to manage employees who have engaged in "protected activities" without fear of retaliation claims.

OVERVIEW OF FEDERAL ANTI-RETALIATION PROVISIONS

Preventing unlawful employment discrimination does not by itself insulate an employer from liability under federal anti-discrimination statutes. All federal employment-related statutes (and many state and city laws), prohibit employers from taking retaliatory action against an employee, applicant, or a former employee *because* the individual opposed an unlawful employment practice or participated in the assertion of a claim under the relevant anti-discrimination law. These individuals are deemed to have engaged in "protected activity." Federal laws, including Title VII of the Civil Rights Act of 1964, as amended, (Title VII),[4] the Americans with Disabilities Act (ADA),[5] the Age Discrimination in Employment Act (ADEA),[6] the Fair Labor Standards Act (FLSA),[7] the Employee Retirement Income Security Act (ERISA),[8] the Occupational Safety and Health Act (OSHA),[9] the Family and Medical Leave Act (FMLA),[10] and the National Labor Relations Act (NLRA),[11] all contain provisions creating an independent right of action for employees subjected to retaliation.

Even some laws not typically thought of as affecting the employment relationship provide employees with protection against retaliation. For example, the recently enacted Sarbanes-Oxley Act,[12] typically considered a corporate governance law, prohibits retaliation against employees who report suspected violations of the federal mail, wire or bank fraud statutes, SEC rules or regulations, or any other provision of federal law relating to fraud against shareholders. In addition, there are state statutory and common law prohibitions against employer retaliation in response to certain types of employee conduct. These laws run the gamut from whistleblower statutes to workers compensation laws.

While the language in each statute's retaliation provision varies slightly, the legal framework virtually mirrors the analysis that courts have articulated for retaliation claims brought under Title VII. Because courts have adopted the Title VII methodology in analyzing retaliation claims brought under a variety of different statutes,

reviewing Title VII retaliation law principles is instructive.

WHAT MUST A PLAINTIFF PROVE TO PREVAIL IN A RETALIATION CLAIM?

As with discrimination claims, retaliation claims are analyzed using a *McDonnell Douglas* three-step shifting burden of proof.[13] The complainant must first establish a *prima facie* case of retaliation. The employer must then present a legitimate, non-retaliatory reason for taking the action in question. Thereafter, the plaintiff bears the ultimate burden of proving that the employer's explanation is merely a pretext for actual retaliation. Jurors, furthermore, are free to infer that retaliation was the real reason for the employer's action based upon the falsity of the employer's explanation combined with the establishment of a *prima facie* case.

The *Prima Facie* Case

A *prima facie* case of retaliation requires the establishment of the following conditions: (1) the plaintiff participated in a *protected activity*; (2) the employer subjected the *plaintiff* to some *adverse* employment action; and (3) there is a *causal* connection between the protected activity and the adverse employment action. Causation, moreover, can be established by the temporal proximity between the employer's knowledge of the protected activity and the adverse action, even without direct evidence of retaliatory animus.

The use of the term *plaintiff* in the second prong is purposeful. The plaintiff in a retaliation suit does *not* have to be a current employee to assert a claim. The Supreme Court has held that *former employees* can maintain viable claims for retaliation under Title VII.[14] Some courts have even extended anti-retaliation protections to individuals who are closely associated to the person who engaged in protected activity. Under this rationale, if the associated person (*e.g.*, parent, spouse, or sibling) is employed by the same company as the employee who actually opposed the discriminatory conduct, the associated person may bring a retaliation claim if the person is subjected to an adverse employment action because of the relative's protected activity. In *Fogleman v. Mercy Hosp., Inc.*,[15] for example, Greg Fogleman alleged that he was terminated from employment solely because his father, also an employee of the hospital, sued the employer for disability discrimination. The court ruled that the son stated a retaliation claim under the ADA on the theory that the hospital's termination decision was triggered by his father's protected activity.

What Constitutes Protected Activity?

When analyzing retaliation claims under federal statutes, courts frequently apply Title VII principles to determine whether the employee's conduct constitutes protected activity. The retaliation provision of Title VII of the Civil Rights Act of 1964, Section 704(a),[16] prohibits discrimination against an individual:

> (1) because the individual has opposed any practice made an unlawful practice by this [act]; or
>
> (2) because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [act].

These two clauses are usually referred to as the opposition and participation clauses, respectively. Assessing the aggrieved employee's conduct to determine whether the individual's acts are afforded legal protections under the aforementioned circumstances is critical in avoiding retaliation claims.

The Opposition Clause. The opposition clause makes it unlawful to discriminate (*i.e.*, retaliate) against an individual because the individual has opposed any practice made unlawful under the employment discrimination statutes. As the caselaw has evolved, an employee must satisfy three general requirements to maintain protection under the opposition clause: (1) the employee's internal complaint must be specific enough to place the employer on notice that the employee opposed unlawful discrimination, (2) the employee's manner of opposition must be reasonable, and (3) the employee's belief that the action the employee is opposing is an unlawful practice must be both reasonable and made in good faith.

When opposing discrimination, the employee's complaint must be sufficiently specific so as to place the employer on notice of the conduct perceived to be unlawful. Generalized complaints of unfair treatment will not suffice, such as complaints for doing non-business related personal tasks for a supervisor.

An employee must also choose a reasonable manner to oppose unlawful discrimination. In this regard, an employee is not restricted to using an internal complaint procedure to oppose perceived discriminatory acts of the employer. Legitimate employee opposition may include informal protests of discrimination, refusals to partici-

pate in discriminatory activities, threats to file a charge of discrimination, and speaking to the media about terms and conditions of employment at the company. An employee can make a complaint or protest about alleged employment discrimination to anyone (*e.g.*, a manager, co-worker, company EEO official, union official, attorney, newspaper media reporter, Congressperson) and, usually, retain the protections of the act, so long as there is evidence that the employer became aware of the employee's protest and its content. Additionally, according to the EEOC, the employee's opposition may take a nonverbal form, such as picketing or even engaging in a production slow-down. An employee's conduct would also be protected by the opposition clause if the employee threatens to file a discrimination complaint with a government agency, a union, or any other entity that receives discrimination complaints, even if the complaint is *not* subsequently filed.

Despite the many avenues available for opposing perceived unlawful conduct, not all forms of employee protest are protected. Courts hold that employee opposition that is so disruptive that it unreasonably interferes with an employer's legitimate business interests is not protected. Accordingly, courts use a balancing test to distinguish protected opposition from conduct that is so obstreperous and aggressively unreasonable that it impedes the employer's legitimate business interests. Acts of opposition deemed unreasonable include: illegal activities, conduct that breaches employer confidentiality or security, acts inimical to the employer's legitimate business interests, and conduct that substantially interferes with the employee's or co-workers' job performance. For example, an employee who punched a customer in response to an alleged physical touching lost statutory protection as the oppositional conduct was not reasonable.[17] Courts review forms of opposition for reasonableness by taking into account the facts and circumstances of the particular situation.

Employing this fact specific approach in *Matima v. Celli*,[18] the United States Court of Appeals for the Second Circuit found that extremely disruptive employee protests were *not* reasonable and, accordingly, did not protect the complaining employee from termination. *Matima* involved a black, South African national, who worked as a pharmacist for Ayerst Laboratories. Matima alleged that his supervisor was racially biased. Ayerst immediately investigated and found Matima's complaints meritless. Subsequently, Matima made additional complaints about his supervisor, claiming that he was not given training, was not given credit for work performed on specific projects, and that he was harassed, generally, because of his race and immigration status. Ayerst again investigated and found no support for Matima's allegations; nonetheless, Ayerst proposed bi-weekly meetings to review any work-related problems Matima was having to improve communications and reduce possible misunderstandings. Dissatisfied with these initiatives, Matima asked to meet with Ayerst's top managers. He also lodged a race discrimination complaint with the New York State Division of Human Rights and the EEOC.

Following meetings with senior managers, Matima sent accusatory letters to Ayerst's corporate executives. In these letters, Matima alleged that his evaluations were libelous, that the managers could not be trusted, and that managers had displayed "racially motivated hostility" towards him. As a result, he refused to complete a self-appraisal form required of all Ayerst employees. In response, Matima received a written warning that his tone with management was unacceptable and demonstrated an uncooperative attitude. He was also warned to utilize the internal complaint procedures and not write senior management without first resorting to these procedures to resolve his disputes.

On the same day that Matima was issued his EEOC notice of right to sue letter, he sent another memorandum to Ayerst executives, this time accusing them of defamation: "It has come to our attention that you gentlemen are engaged in attempts to slander and defame our character…please stop playing race politics. Do not set African brothers against each other because you are not going to divide and conquer us anymore."[19] Upon management's receipt of this memorandum, Matima was suspended for insubordination for one day because he ignored the earlier directive to follow the established complaint procedure.

Thereafter, Matima was terminated following a confrontation over a time-sheet. After his one-day suspension, Matima was absent from work for three days. When he reported to work, he was asked to produce documentation justifying his absences. Matima promptly filled out a time-sheet, writing that his recent absences were due to "illegal retaliation." Matima was told to rewrite his time-sheet to accurately reflect that one day of absence was due to "disciplinary

action" and that the other absences were "unapproved absences." Matima refused, became agitated and started shouting. He was then escorted from the building.

After fully considering Matima's conduct, Ayerst terminated Matima's employment. Ayerst officials later testified that Matima "was fired for insubordination and basically creating such havoc and discontent in the lab that it was not a suitable work environment for the remaining people on the staff."[20]

At trial, the jury ultimately concluded that Ayerst would have terminated Matima and taken the same employment actions even absent a retaliatory motive. In affirming the verdict, the Second Circuit joined other appellate courts in holding that "disruptive or unreasonable protests against discrimination are not protected under Title VII and therefore cannot support a retaliation claim." The court of appeals declared that "[a]n employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work of the enterprise."[21] Under these facts, the court of appeals found that the jury was entitled to find that Matima's protests, taken as a whole, were unreasonable, disruptive and justified his termination. Accordingly, if an employee's conduct transgresses ordinarily acceptable behavior in the workplace and interferes with the work of co-workers and managers, it may not be protected, even if that conduct is taken in opposition to allegedly discriminatory employer actions.

Not only must the form of the employee's opposition be reasonable, but most courts also find that employee opposition must be based on a reasonable and good faith belief that the employer's conduct is unlawful. Hence, even if the employer's conduct does not, in fact, violate an anti-discrimination statute, the employee may still be protected. One of the questions that has arisen, however, is whether the employee's belief that drove the conduct should be assessed on an objective or subjective standard.

In *Clark County Sch. Dist. v. Breeden*,[22] the Supreme Court had to determine whether a plaintiff's belief that she was opposing unlawful conduct was reasonable and, therefore, if her opposition was protected. In this case, Shirley Breeden, her male supervisor, and another male employee met to review psychological evaluation reports of four job candidates. One of the applicant's reports disclosed that the applicant had once said to a co-worker, "I hear making love to you is like making love to the Grand Canyon." Breeden's supervisor read the comment aloud, looked at Breeden and remarked, "I don't know what that means." The male co-worker responded to the supervisor, "I'll tell you later" and both men laughed. Breeden complained about this incident to management and then brought a retaliation suit in which she alleged that she was punished for making her complaints.

Although the Supreme Court did not directly address the standard to be used, it opined that under any standard, plaintiff's belief that this "isolated incident" of a sexual nature constituted an unlawfully "hostile work environment in violation of Title VII," was *not* reasonable. In so holding, the Court used an objective standard to examine plaintiff's belief, finding it unreasonable, and did not even consider plaintiff's subjective good faith in finding her conduct unprotected.

The Participation Clause. Anti-retaliation provisions make it unlawful to discriminate against any individual because of any charges made, testimony, assistance rendered, or participation in any manner in an investigation proceeding, hearing, or litigation under the employment discrimination statutes. While courts carefully engage in a fact-based inquiry to assess whether specific conduct constitutes reasonable "opposition," they generally give "participation" exceptionally broad protection and do not subject conduct brought under the participation prong to a balancing test.

In *Glover v. S.C. Law Enforcement Div.*,[23] a former employee was deposed in a discrimination case brought against her former employer. During the deposition, she freely offered information well beyond the scope of questioning, even criticizing the employee who succeeded to her job, although that person had nothing to do with the alleged discrimination at issue. In the course of testifying, she accused her successor of mismanagement, destruction of records, wasting funds, inappropriate behavior and dishonesty. Her current employer learned of this testimony, concluded that it reflected a considerable "lack of judgment" on her part, and decided not to retain her at the end of her probationary period. She sued her employer claiming retaliation. Although the district court dismissed her suit, reasoning that the testimony that led to her termination was not

protected because it was gratuitous and unresponsive, the U.S. Court of Appeals for the Fourth Circuit reversed. The appellate court held that employers may not retaliate in any way for an employee's participation in a Title VII proceeding and opined that even if an employee's testimony is filled with false statements, made in bad faith, or unreasonable, the individual testifying still maintains protected status from retaliatory conduct. In contrast to the opposition clause, the Fourth Circuit reasoned that Title VII's participation clause protects employees, categorically, from retaliation where they have "made a charge, testified, assisted, or participated *in any manner*" in a protected proceeding.[24]

Similarly, in *Merritt v. Dillard Paper Co.*,[25] the United States Court of Appeals for the Eleventh Circuit found that when an individual testifies in a discrimination case and admits to conduct that would otherwise justify his termination, the individual testifying still maintains protection from retaliation if his testimony is the basis upon which the discharge decision was made. In *Merritt*, a male employee testified in a sexual harassment case brought by a female coworker that he had made repeated inappropriate sexual remarks in the workplace. Following a settlement in the underlying case, a Dillard official terminated Merritt because his "deposition was the most damaging to Dillard's case." In turn, Merritt sued his employer claiming that his termination was retaliatory because he had engaged in a protected participatory activity. The district court disagreed and granted the employer's motion for summary judgment dismissing the lawsuit. However, the Court of Appeals reversed, holding that Title VII's participation clause prohibited the termination based on deposition testimony in the other proceeding. As the Court of Appeals explained, the anti-retaliation provision does not place employers in a no-win situation so long as employers mete-out discipline for reasons *not* prohibited by Title VII *and* there is no direct evidence of retaliatory motive.

Unlike opposition clause jurisprudence, under the participation clause, most courts hold that a plaintiff does not have to act reasonably or in good faith when filing a discrimination claim, or participating in discrimination proceedings to be protected from retaliation. In *Pettway v. Am. Cast Iron Pipe Co.*,[26] the court went so far as to hold that even a plaintiff who makes false statements in an EEOC charge is protected. In *Pettway*, the plaintiff employee wrote a letter to the EEOC and the President of the United States in which he made unsupported claims that the employer had either bribed or improperly influenced EEOC officials who investigated his complaint and that the company was receiving "some type of cover-up protection for its unfair employment practices."[27] The Fifth Circuit Court of Appeals held that the plaintiff's complaint was still protected activity, despite its falsity and the presence of "malicious material."

What Actions By The Employer Are Adverse?

Not only must an employee demonstrate engagement in protected activity, but the employee must show that suffering from an adverse employment action is a *result* of engaging in that activity. Unfortunately for human resources advisors and managers, there is no single standard to determine whether employer conduct constitutes a cognizable *adverse* employment action satisfying the second element of the *prima facie* case. Some courts hold that adverse employment actions are limited to *ultimate employment decisions*, such as hiring, firing, and promotions; other courts hold that an employee suffers an adverse employment action if that employee suffers a materially adverse change in the terms and conditions of employment; and one federal circuit court and the EEOC have stated that an adverse employment action is any adverse treatment based on a retaliatory motive and which is reasonably likely to deter the charging party or others from engaging in protected activity. The latter standard is, unquestionably, very broad and restrictive to employers.

The most severe and obvious types of detrimental employment acts — refusal to hire, denial of job benefits, denial of promotion, suspension from work without pay, demotion, or discharge — almost always constitute an adverse employment action. Similarly, trivial actions such as taking away a cell phone, refusing to permit an employee to attend a convention, or a poor job evaluation, usually, do not constitute adverse employment actions.

Other employment actions are more difficult to characterize as *adverse* employment actions. These might include harsh criticisms, reprimands, supervisor and coworker ostracism or hostility, transfers, written warnings, shift changes, and even counter-claims interposed by an employer in response to a discrimination suit filed by an employee. Because the nature of an *adverse* employment action differs by locale and is often dependent on factual circumstanc-

es, it is always a good idea to consult with employment counsel before taking any employment actions against an employee who has made a complaint, opposed perceived discriminatory conduct, or participated in a discrimination proceeding.

What Must an Employee Show to Establish a Causal Link?

Because most retaliation cases arise from changes in terms and conditions of employment, the element most frequently at issue is *causation*. To make out a retaliation case, an aggrieved employee must show that a motivating factor in the employer's decision to take the adverse action was the employee's protected conduct. This can be established directly through evidence of retaliatory animus, or indirectly through circumstantial evidence, such as by showing that the protected activity was followed closely in time by discriminatory treatment or through other evidence, such as disparate treatment in comparison to co-workers who were similarly situated. Thus, a manager's departure from the company's policy or regular practice, retaliatory comments, or a close correlation in time between the protected act and the alleged retaliation can each support an inference of discrimination sufficient to establish a *prima facie* case of retaliation.

Knowledge of Protected Activity. Establishing a causal connection requires a showing that retaliation was a motivating factor in the decision to take the adverse action; as a result, courts hold that employer knowledge of the protected activity is essential to demonstrate causation. However, employer knowledge by itself is not dispositive of causation. Employers can still defeat retaliation claims even if someone at the company is aware of the protected activity, so long as the decisionmaker(s) responsible for the adverse employment action is not aware of the employee's protected activity. If an individual with knowledge of the protected activity has some input into the adverse decision, some courts have found that an employer can refute a retaliatory inference if a person without knowledge of the protected action conducts an independent investigation of the facts before the ultimate decision is made and recommends that action be taken against the employee. Moreover, positive treatment of the employee *after* the employer learned of the employee's protected activity but *before* the adverse action is taken may also negate the inference of causation.

Temporal Proximity. There is no definitive standard to determine how close in time the protected activity must be to the adverse action for causation to be established. Suffice it to say, a close correlation in time "supports an inference of discrimination sufficient to establish a *prima facie* case."[28] In *Breeden*, the complaining employee alleged that she was transferred after she filed her EEOC charge and the lawsuit. The Supreme Court found, however, that a gap of twenty months between the filing of the employee's charge and the adverse action was too long to satisfy causation and cited other decisions in which the passage of three or four months' time was considered too long a gap to satisfy the causation element without more.[29] Turning to the allegation that the transfer occurred just three months after the EEOC issued its right to sue letter, the court rejected causation, finding that the decisionmaker had contemplated the transfer before EEOC issued its letter and further found "utterly implausible" the suggestion that issuance of EEOC's notice of right to sue constituted a protected activity of the employee.[30]

Long gaps of time, however, will not necessarily refute an inference of retaliation when there is evidence that a pattern of antagonism arose following the employee's protected activity or if there is some other indicia of retaliatory animus. In *Woodson v. Scott Paper Co.*, the plaintiff, an African-American male, brought suit against his employer claiming that he was a victim of unlawful retaliation in violation of Title VII.[31] The court found the evidence of causation sufficient to establish a causal link despite the two-year gap between the employee's charge filing with EEOC and his alleged retaliatory discharge. The court explained that a two-year gap in time does not alone negate causation *if* the plaintiff comes forward with evidence from which an inference of retaliation can be drawn. Here, Woodson alleged that he was "set up to fail" in his position, that he had been asked to drop his complaints by an employee who influenced the termination decision, and that his work performance was evaluated by company officials who knew of his discrimination charge but who were unfamiliar with his prior consistently high performance reviews. Hence, a pattern of conduct that indirectly demonstrates a retaliatory motive reduces the importance of temporal proximity and, accordingly, suffices to establish causation. As the *Woodson* court opined, "mere passage of time is not legally conclusive proof against retaliation."[32]

At the same time, if the employer contemplated employment actions *prior* to discovering the employee's protected activity, courts will be disinclined to find causality, as the Supreme Court's *Breeden* decision establishes.

Disparate Treatment. An employer's unique treatment of an employee who engaged in protected activity may also constitute evidence of causation where there is proof that the employer treated similarly situated co-workers differently. Similarly, an employer's departure from a regular practice or procedure with respect to an individual who participated in protected activity may be evidence that retaliation was a motivating factor in the employer's decision. Generally, employers are well advised to train managers/supervisors to adhere to company policies and procedures and enforce them uniformly; this becomes even more important when managing an employee who has engaged in protected activity.

THE EMPLOYER'S BURDEN

Once an employee has established a *prima facie* case of retaliation, the employer can rebut the presumption of retaliation by presenting evidence of legitimate, non-retaliatory reasons for the employment action. For example, an employer may demonstrate that it did not retaliate against the plaintiff when it discharged him, even though the termination occurred after the plaintiff engaged in protected activity, by showing that the employee had a history of rule violations or poor evaluations for which discipline/warnings had been issued that *predated* the protected activity. An employer may also carry its burden if it can show that the employee engaged in conduct that independently justified his termination (*e.g.*, theft of employer property), apart from the protected activity.

Whatever the reason for the employment action meted-out, an employer must ensure that its explanation is truthful and fully supportable. In this regard, employers should keep in mind that a jury is permitted to infer a retaliatory motive based upon its disbelief of the employer's stated reason for its actions. Consequently, employers must be able to demonstrate that their employment decisions are legitimate and do not "single-out" the employee engaged in protected activity for special treatment. Proper documentation goes a long way to inoculate employers from claims that unlawful motives drove the employment action taken. If an employer's explanation is shown to be incredible, untruthful, or a departure from its practice, it will more likely appear to be a pretext from which a jury can infer retaliatory motives, even if there is no direct or circumstantial evidence linking the protected activity to the employment action.

Reeves v. Sanderson Plumbing Prods., Inc.,[33] a case arising under the ADEA, is useful in examining the employer's burden in retaliation cases. In *Reeves*, the employer explained that the 57-year-old plaintiff was fired for "shoddy record keeping." In rebuttal, plaintiff demonstrated he had properly maintained attendance records consistent with company policy and was not responsible for any failure to discipline employees for lateness or absences. Once Reeves demonstrated that the employer's articulated reason for his termination was not supportable, the jurors were free to conclude that the real reason for Reeves' termination was his age, even though the employer maintained age had nothing to do with the termination. It is imperative, therefore, that the employer document the employee's transgressions and present corroborating evidence for the employment action taken.

However, even when an employer presents evidence of non-discriminatory reasons for the employment action taken against an employee who has engaged in protected activity, problems can still arise. In *Winarto v. Toshiba Am. Elecs. Components, Inc.*,[34] plaintiff Majarti Winarto, who had worked for Toshiba since 1992 (and was of Indonesian ancestry), was laid-off in 1995. During her three years of employment, she was subjected to constant verbal and physical abuse from her co-worker, Ronald Birtch, because she was an Asian woman. After reporting the incidents to Human Resources and her supervisor, Roger Taylor, Winarto received low performance ratings. In 1995, a human resource supervisor, unfamiliar with Winarto's complaints, reviewed the recent performance evaluations of all employees in Winarto's department and determined Winarto should be laid-off. Subsequent to her layoff, Winarto filed suit against Toshiba alleging discrimination and retaliation under Title VII. The case went to trial and a jury awarded Winarto $93,000 in compensatory damages. The trial court vacated the award and ruled that as a matter of law Toshiba had carried its burden and that Winarto had failed to prove that the reason proffered by Toshiba, low performance ratings, was false or pretextual.

The U.S. Court of Appeals for

the Ninth Circuit reversed the decision and remanded the case to the trial court. The Ninth Circuit held that even though Toshiba established its legitimate business reason for terminating Winarto's employment, the jury could still find that Winarto was terminated in retaliation for making complaints to the company's Human Resources Department. In the Court's view, the earlier retaliation permeated the performance evaluation process and impermissibly tainted the subsequent, and otherwise legitimate, non-retaliatory business reason for the layoff.

Winarto stands as a reminder that employers are well advised to review all actions taken in connection with an employee who has engaged in protected activity to ensure that its employment actions are free of retaliatory influences.

THE BURDEN SHIFTS BACK: THE EMPLOYEE'S DEMONSTRATION OF PRETEXT

After an employer articulates a legitimate reason for its actions, an employee must ultimately prove that retaliation motivated the adverse employment action and that the employer's proffered legitimate explanation is pretextual. As noted above, if the plaintiff can show that the employer's purported business reasons are "unworthy of credence" then that, by itself, may be sufficient to establish pretext. As the Supreme Court stated in *Reeves*, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose…[m]oreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation…"[35] Manifestly, any adverse employment action taken against an employee who has engaged in protected activity must be credible, well-supported, and in conformity with the employer's general practices.

MANAGING EMPLOYEES AFTER PROTECTED ACTIVITY

Whenever an employee complains to the human resources department, a manager, or the EEOC about perceived discriminatory treatment or harassment — even if the employee's perceptions are wrong — it is important that the manager continue to treat the employee in the same fashion as every other employee. In these cases, human resources professionals must exercise leadership to prevent retaliation and ensure that all employment actions taken are for good and legitimate business reasons.

Managers do not have to treat employees with "kid gloves" simply because the employee engaged in protected activity. Discipline may still be imposed on employees for absences, performance problems, etc., provided the manager is applying the same standards to other employees in the absence of protected activity. The protection from retaliation does not preclude the imposition of legitimate disciplinary action so long as it is justified by an employee's misconduct or poor performance and does not represent a departure from the employer's policy or practice.

Employers must make certain that any adverse employment action taken can be defended on an objective basis. If no action was ever taken about an employee's poor performance before that employee complained of discrimination, doing something after a discrimination complaint is filed will no doubt give rise to a retaliation claim. It is for this reason that documenting absenteeism, misconduct, or performance problems contemporaneously, at the time of the occurrence, is very important. Equally important, the employee who is absent, engages in misconduct, or performs poorly must be counseled or warned and a notation of the discipline must be documented. If an employee engages in protected activity, the management team should seek independent guidance from other managers, human resources professionals, or legal counsel before taking an adverse action against that employee to ensure that any employment action taken is for objectively legitimate reasons. Indeed, it is best if a human resources professional or manager who is unaware of the employee's complaint makes the "ultimate" employment decisions affecting the complainant.

After making a discrimination complaint, an employee, typically, will keep a close eye on management to see if any effort is made to remedy the situation, as well as to see whether the complainant's treatment in the workplace is adversely affected. Managers should assume that the complaining employee will be quite sensitive to any actions taken, including job transfers or shift changes. In addition, it is a good practice to train managers never to discourage an employee from the assertion of legal rights and to avoid making comments that may be perceived or understood as threats, even if the intent is otherwise.

Steps can be taken to manage employees without fear of retaliation. As the number of retaliation claims rise along with the prospect

of large punitive damages awards, employers can develop strategies to avoid or defeat such claims. *First*, employers should adopt and distribute anti-retaliation policies along with their anti-discrimination and anti-harassment policies. *Second*, employees must be alerted to an internal complaint procedure which can be accessed to resolve retaliation claims. *Third*, managers and supervisors must be trained in basic retaliation law principles. This can be accomplished in regular annual training devoted to preventing employment discrimination and harassment in the workplace. However, simply telling managers and supervisors not to retaliate is insufficient as the subtleties involved in this area of the law might be lost. Discussing hypothetical situations and case studies in which managers/supervisors are asked to participate is a preferred training methodology.

Fourth, it cannot be overly emphasized that managers and supervisors be reminded to follow company policies and procedures in addressing employee behaviors. *Fifth*, documenting counseling sessions, verbal and written reprimands, employee attendance issues, all incidents of misconduct, as well as annual performance appraisals are key components to establish legitimate business reasons underlying adverse employment actions taken against an employee. *Sixth*, communicating with the employee about an attendance or performance problem and making a notation of that meeting is also important. Documenting the file without also communicating with the employee is not a practice that will normally win points with a jury!

Finally, making good common sense decisions cannot be overstated. This requires good communication between HR professionals and all levels of management to ensure that when adverse employment actions are taken, they are implemented for objectively legitimate business reasons and are not based on questionable motivations. When an employee complains of discrimination or harassment, HR professionals must investigate those claims and, when necessary, remedy meritorious complaints. However, simply because the employee alleged discrimination does not mean that the employee cannot be managed if there are performance or attendance problems or this person engages in workplace misconduct. The key is to adopt the right strategies to avoid the retaliation claim. ■

NOTES:

1. Equal Employment Opportunity Commission, Charge Statistics from the U.S. Equal Employment Opportunity Commission, FY 1992 through FY 2002 at *www.eeoc.gov/stats/charges.html* (last accessed 7/1/03).
2. Equal Employment Opportunity Commission, EEOC Guidance on Investigating and Analyzing Retaliation Claims, EEOC Compliance Manual, Vol. 2, § 8-III (B)(2).
3. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 75 Fair Empl. Prac. Cas. (BNA) 1741, 72 Empl. Prac. Dec. (CCH) ¶ 45258, 39 Fed. R. Serv. 3d 348 (8th Cir. 1997).
4. 42 U.S.C.A. § 2000e-3(a).
5. 42 U.S.C.A. §§ 12203 (a), (b).
6. 29 U.S.C.A. § 623(d).
7. 29 U.S.C.A. § 215(a)(3).
8. 29 U.S.C.A. §§ 1132(a), 1140.
9. 29 U.S.C.A. § 660(c).
10. 29 U.S.C.A. §§ 2615(a)(1), (a)(2), (a)(b).
11. 29 U.S.C.A. § 158(a)(4).
12. 18 U.S.C.A. § 1514(A).
13. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 Fair Empl. Prac. Cas. (BNA) 965, 5 Empl. Prac. Dec. (CCH) ¶ 8607 (1973).
14. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808, 72 Fair Empl. Prac. Cas. (BNA) 1856, 69 Empl. Prac. Dec. (CCH) ¶ 44493 (1997).
15. *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 12 A.D. Cas. (BNA) 1505, 88 Fair Empl. Prac. Cas. (BNA) 513, 82 Empl. Prac. Dec. (CCH) ¶ 40986 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 112, 154 L. Ed. 2d 35, 13 A.D. Cas. (BNA) 1056, 89 Fair Empl. Prac. Cas. (BNA) 1888 (U.S. 2002).
16. 42 U.S.C.A. § 2000e-3(a).
17. *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 73 Fair Empl. Prac. Cas. (BNA) 219, 69 Empl. Prac. Dec. (CCH) ¶ 44500 (9th Cir. 1997).
18. *Matima v. Celli*, 228 F.3d 68, 83 Fair Empl. Prac. Cas. (BNA) 1660, 79 Empl. Prac. Dec. (CCH) ¶ 40306 (2d Cir. 2000).
19. *Matima v. Celli*, 228 F.3d 68, 75, 83 Fair Empl. Prac. Cas. (BNA) 1660, 79 Empl. Prac. Dec. (CCH) ¶ 40306 (2d Cir. 2000).
20. *Matima v. Celli*, 228 F.3d 68, 76, 83 Fair Empl. Prac. Cas. (BNA) 1660, 79 Empl. Prac. Dec. (CCH) ¶ 40306 (2d Cir. 2000).
21. *Matima v. Celli*, 228 F.3d 68, 79, 83 Fair Empl. Prac. Cas. (BNA) 1660, 79 Empl. Prac. Dec. (CCH) ¶ 40306 (2d Cir. 2000).
22. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509, 152 Ed. Law Rep. 492, 85 Fair Empl. Prac. Cas. (BNA) 730, 80 Empl. Prac. Dec. (CCH) ¶ 40442 (2001).
23. *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 79 Fair Empl. Prac. Cas. (BNA) 276, 75 Empl. Prac. Dec. (CCH) ¶ 45779 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146, 120 S. Ct. 1005, 145 L. Ed. 2d 1065, 84 Fair Empl. Prac. Cas. (BNA) 960 (2000).
24. *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414, 79 Fair Empl. Prac. Cas. (BNA) 276, 75 Empl. Prac. Dec. (CCH) ¶ 45779 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146, 120 S. Ct. 1005, 145 L. Ed. 2d 1065, 84 Fair Empl. Prac. Cas. (BNA) 960 (2000); 42 U.S.C.A. § 2000e-3(a).
25. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 74 Fair Empl. Prac. Cas. (BNA) 1511, 71 Empl. Prac. Dec. (CCH) ¶ 44977, 149 A.L.R. Fed. 761 (11th Cir. 1997).
26. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1 Fair Empl. Prac. Cas. (BNA) 752, 71 L.R.R.M. (BNA) 2347, 2 Empl. Prac. Dec. (CCH) ¶ 10011, 60 Lab. Cas. (CCH) ¶ 9253, 11 A.L.R. Fed. 302 (5th Cir. 1969).
27. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1002, 1 Fair Empl. Prac. Cas. (BNA) 752, 71 L.R.R.M. (BNA) 2347, 2 Empl. Prac. Dec. (CCH) ¶ 10011, 60 Lab. Cas. (CCH) ¶ 9253, 11 A.L.R. Fed. 302 (5th Cir. 1969).
28. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 68 Fair Empl. Prac. Cas. (BNA) 1508, 67 Empl. Prac. Dec. (CCH) ¶ 43816 (2d Cir. 1995).
29. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509, 152 Ed. Law Rep. 492, 85 Fair Empl. Prac. Cas. (BNA) 730, 80 Empl. Prac. Dec. (CCH) ¶ 40442 (2001).

30. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509, 152 Ed. Law Rep. 492, 85 Fair Empl. Prac. Cas. (BNA) 730, 80 Empl. Prac. Dec. (CCH) ¶ 40442 (2001).
31. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 73 Fair Empl. Prac. Cas. (BNA) 1237, 71 Empl. Prac. Dec. (CCH) ¶ 44838 (3d Cir. 1997), reh'g and suggestion for *reh'g in banc denied*, (May 6, 1997).
32. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920, 73 Fair Empl. Prac. Cas. (BNA) 1237, 71 Empl. Prac. Dec. (CCH) ¶ 44838 (3d Cir. 1997), *reh'g and suggestion for reh'g in banc denied*, (May 6, 1997).
33. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 82 Fair Empl. Prac. Cas. (BNA) 1748, 78 Empl. Prac. Dec. (CCH) ¶ 40045 (2000).
34. *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 87 Fair Empl. Prac. Cas. (BNA) 1059 (9th Cir. 2001), *cert. dismissed*, 123 S. Ct. 816, 154 L. Ed. 2d 766 (U.S. 2003).
35. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 82 Fair Empl. Prac. Cas. (BNA) 1748, 78 Empl. Prac. Dec. (CCH) ¶ 40045 (2000).

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