Whistleblower, Retaliation & Protected Concerted Activity

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Why Should You Care?

5. Very popular claims
4. Judges are conservative on Summary Judgment
3. Humans are human
2. Humans hate losing big money
1. Burlington Northern
Retaliation Claims

- An Increasingly Common Claim
  - All major state and federal employment discrimination laws contain provisions that prohibit retaliation against any employee who engages in activity protected by the statute.
  - According to statistics from the federal Equal Employment Opportunity Commission, while the total number of claims filed with that agency between 1992 and 2003 increased by 12%, the number of retaliation claims during that same time period was up by 104%. 
Retaliation Claims

- Scope of the Retaliation Provisions
  - Who is protected under the statutory provisions barring retaliation?
    - Anyone who complains of harassment or discrimination.
Retaliation Claims

- Any one who participates in the investigation or prosecution of someone else's complaint.
- Anyone who "opposes" any violation of the employment discrimination laws.
Retaliation Claims

- The protection against retaliation applies even if the claim of discrimination or harassment itself is ultimately found to be meritless.
- Employers must be careful not to turn a bad discrimination or harassment case into a good retaliation claim.
Retaliation Claims

- What does it mean to retaliate?
  - An employer may not take an adverse employment action against an employee because of a complaint of harassment or other protected activity.
Retaliation Claims

- A recent decision from the United States Supreme Court interpreting Title VII of the Civil Rights Act of 1964 holds that employers are also more broadly prohibited from taking any action that might discourage a reasonable employee from complaining of unlawful harassment or discrimination.
Retaliation Claims

*Burlington Northern & Santa Fe Railway Co. v White*, 126 S.Ct. 2405 (2006). Plaintiff, a laborer in the defendant’s railyard, complained of sexual harassment by her immediate supervisor. The company investigated, and after an internal investigation suspended the supervisor for 10 days and ordered him to attend a sexual harassment training session.
Retaliation Claims

When plaintiff was informed of her supervisor’s discipline, she was also informed that the company was removing her from forklift duty, which had been her primary job duty. She was assigned to other duties such as cutting brush and cleaning litter and cargo spillage from the premises. Her pay and benefits were unchanged, and all of these duties were within her job description.
Later, after a disagreement with another supervisor, the plaintiff was suspended without pay for insubordination. An internal investigation of that incident led defendant to conclude that she had not been insubordinate, and she was reinstated to her position and awarded back pay for the entire time of her suspension.
Retaliation Claims

The Supreme Court concluded that both the change in her job duties and the temporary suspension were sufficient to support a claim of retaliation. Even though all of the duties assigned to her were within her job description, and even though she ultimately lost no pay or benefits as a result of the suspension, the Supreme Court concluded that either of these acts could intimidate a typical employee and discourage them from making a harassment complaint. A jury verdict in favor of the plaintiff was affirmed.
Avoiding Retaliation Claims

- Policies against harassment and discrimination must make clear that no one may retaliate against an individual who makes a claim under the policy.

- Managers and supervisors must be properly trained in the handling of complaints, and in particular, trained to avoid taking any action that could be deemed retaliatory.
Avoiding Retaliation Claims

- Effectively evaluate employees on a regular basis, and document performance problems. Employees who complain of harassment are not immune to discharge or discipline if it is warranted by their performance. But the file should support the action taken, and ideally documentation of performance problems should not begin only after the employee has complained.
Whistleblower Claims

Whistleblower Protection Act provides:

- Employer cannot discharge, threaten or otherwise discriminate against an employee because the employee, or a person acting on behalf of the employee reports, or is about to report verbally or in writing a violation or suspected violation of a law, regulation or rule to a public body unless the employee knows that the report is fake.

- Employee’s motive must be to inform the public on matters of public concern, and not personal vindictiveness.
Protected Concerted Activities

A Potential Trap for the Unwary Employer
What the Law Says

The National Labor Relations Act protects the organizational rights of all employees, both union and non-union alike. It states:

- Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .
What the Law Says

- The law protects union employees.
- The law also protects non-union employees who engage in **Concerted** activities for mutual aid or **protection**.
What is “Concerted” Activity?

Activity Must be “Concerted.”

- Generally must involve two or more employees working together.
What is “Concerted” Activity?

A single employee can engage in concerted activity, if such activity is engaged in on the direct authority of other employees.

- Employee must be expressly authorized to speak on other employee’s behalf.
- Not just matters of common concern.
What is “Protected” Activity?

Activity Must be “Protected.”

- In order to be protected, the activity must be for the “mutual aid or protection” of employees. This typically means that the activity must relate to wages, hours, or other terms and conditions of employment.

- Most employee complaints very clearly involve terms and conditions of employment, such as vacations, working conditions, pay, discipline, etc.
What is “Protected” Activity?

Some complaints are more attenuated:

- Protests involving working conditions that the employer has no right or power to effect. (Government legislation or policies.)
- Protests involving management decisions on issues like personnel, advertising, public relations, etc.
What is “Protected” Activity?

Acts of insubordination or disloyalty are not protected

- Falsely and/or publicly disparaging the employer
- Engaging in violence or other unlawful behavior
What is “Protected” Activity?

To be a violation, the discipline must have been taken because of the protected activity

- Was there knowledge?
- Was the protected activity the motivation?
Who is Protected by the Act?

- Temporary employees are protected.
- Supervisors are not protected.
What Types of Communication Could Trigger These Protections?

- Meetings
- Petitions
- Letters
- Emails
- Blogs
Miscellaneous

Employee Weingarten Rights.

- Non-Union employees currently do not have right to have a co-worker present during investigatory interviews.
Scenarios

The Happy-Go-Lucky Toy Company is having some trouble with its employees. Do you know which of these actions would be illegal?
Protected Concerted Activity?

At the monthly staff meeting, Company President, Mr. Weed, announces a new vacation policy requiring two weeks of notice in order to take vacation days. After the meeting, three hourly employees write on the Company’s blog that the Company is being petty and unfair with the employees. The employer suspends the employees for one day for disparaging the Company.
Protected Concerted Activity?

At the end of a workday, a temporary employee brings a petition signed by all of Happy-Go-Lucky’s temporary employees stating that the Company must either hire them on as direct employees or offer them some form of health insurance. The next day, the Company calls the temp agency and asks that the group of temporary employees no longer be assigned to the Company.
Protected Concerted Activity?

During the workday, a group of employees walk off the job to protest unpleasant working conditions, including the extreme heat on the production floor. When the employees report to work the next day, Happy-Go-Lucky discharges them.
The next day, a group of Hispanic employees walk off the job to protest the government’s policies on immigration. Again, the Company discharges the employees the next day.
Protected Concerted Activity?

Happy-Go-Lucky discharges Dean Pacific, a popular supervisor with attendance and attitude problems. The next day, all of Mr. Pacific’s subordinates come to work wearing a pin stating “Bring Back Dean.” Happy-Go-Lucky tells the employees that they have to remove the pins.
Protected Concerted Activity?

During the workday, an employee comes up to a supervisor and says that he doesn’t like the new safety harness and is going back to the old harness. He states that a number of other employees feel the same way. The next day, when the employee wears the old harness, he is disciplined for a safety violation and not following orders.
During a management meeting, a group of supervisors pleasantly express their disagreement with proposed changes in the Company’s health insurance policy. After the meeting, Happy-Go-Lucky immediately terminates all of the supervisors and beats them rather severely.
Conclusion

Union employers need to be and usually are aware of the protection the Act affords for employees engaging in protected concerted activity. Non-union employers are rarely aware of the fact that these protections impact them as well. Employers need to be cognizant of the Act when employees, either individually or in groups, approach the employer to complain about or discuss their terms and conditions of employment. There is no obligation to accede to employee demands, but there is a requirement that employers not take disciplinary action because of these demands.