

NEW WAVE OF RETALIATION AND WHISTLEBLOWING

APLLA 2012 ANNUAL MEETING

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INTRODUCTION

- 17 topics related to retaliation and whistleblowing laws
- Focus on unique, new, and timely topics
- Use legal insights to give practical advice on how best to manage and litigate retaliation and whistleblowing issues and claims
- Emphasis on update regarding Dodd-Frank and SOX whistleblower provisions and hot 2011-2012 cases
- Among other things, Joe will tell us about a controversial and groundbreaking SOX case he brought against Halliburton

ENCOURAGING AN EMPLOYEE TO REAPPLY CAN UNDERMINE A RETALIATION CLAIM

- See, e.g., *Cooper v. Wyndham Vacation Resorts, Inc.*, 570 F. Supp. 2d 981, 988 (M.D. Tenn. 2008) (fact that the employer suggested that the sales representative, who was fired for excessive absenteeism after she filed a workers' compensation claim, could later reapply for a job undercut her claim of retaliation).
- Employers should consider using this in termination letters in the right circumstances.
- Provides one more layer of defense against a retaliation claim.

DENYING DISCRIMINATION CAN BE PROOF OF RETALIATION IF AN EMPLOYER USES THE WRONG WORDS

- *Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011) (“playing the race card” comment by decision-maker caused court to reverse summary judgment)
- Lessons for employers: (1) Loose lips sink ships; (2) such opinions are best only shared with lawyer in attorney-client conference.

HR PERSONNEL?

- Most Courts Hold That Human Resources Personnel And Other Managers Must “Step Outside” Their Normal Job Duties To Engage In Protected Oppositional Activity Under Title VII And Other Anti-Discrimination Laws
 - *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008)
 - *Brush v. Sears Holdings Corp.*, No. 11-10657, 2012 WL 987543 (11th Cir. Mar. 26, 2012)
 - So, “I was just doing my job and they fired me for it!” usually gets the HR plaintiff thrown out of court on a retaliation claim based on the opposition-clause.

SEEMINGLY “NO BRAINER” TERMINATION DECISIONS CAN BECOME CLOSE CALLS WHEN THE EMPLOYEE HAS BEEN PARTICIPATING IN PROTECTED ACTIVITIES

- Expressing A Desire To Kill A Supervisor: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)
- Expressing A Desire To Knock Out A HR Manager’s Teeth: *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190 (7th Cir. 2011)
- Failing To Satisfy A Performance Improvement Plan’s Objective Sales Production Goals That Were Put In Place Before The Employee Engaged In Protected Activity: *Smith v. Xerox Corp.*, 371 Fed. Appx. 514 (5th Cir. Mar. 2010) and *Smith v. Xerox Corp.*, 602 F. 3d 320 (5th Cir. 2010)

WHAT CAN WE LEARN FROM THESE CASE?

- Use a checklist before terminating (www.osattorneys.com).
- Get employee's side of the story, in writing, before making any decision.
- Don't "nitpick" an employee who engaged in protected activity.
- Don't start documenting a termination before a PIP has actually expired.
- Have outside counsel review "high risk" termination decisions, like the one in *Smith v. Xerox*.

POSITIVE TREATMENT OF AN EMPLOYEE AFTER THEIR PROTECTED ACTIVITY IS OFTEN – BUT NOT ALWAYS – REGARDED AS POTENT PROOF OF NON-RETALIATION

- In *Brady v. Houston Independent School Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997) and *Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006), the courts relied on such evidence to reject retaliation claims.
- But, in *Feder v. Bristol-Myers Squibb Co.*, 33 F. Supp. 2d 319, 339 (S.D.N.Y. 1999), the court was unimpressed and skeptical of such evidence.
- Still, if an employer can do something nice for an employee after they have engaged in protected activity, it normally helps.

COURTS ARE SPLIT ON THE AVAILABILITY OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES IN FLSA RETALIATION CLAIMS

■ Emotional Distress Damages

- Most courts say emotional distress damages are recoverable. But, two Texas district court cases say they are not.

■ Punitive Damages

- Courts are split right down the middle on this question.

A SUFFICIENTLY SPECIFIC INTERNAL COMPLAINT, WHETHER ORAL OR WRITTEN, IS PROTECTED FROM RETALIATION UNDER THE FLSA – EXCEPT PERHAPS IN THE SECOND CIRCUIT

- In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), the U.S. Supreme Court held that an employee’s oral complaint could fall within the purview of the FLSA’s anti-retaliation provision.
- The Court did not say if the oral complaint had to be to the DOL, rather than to the employer, to be protected.
- But, every circuit to rule on the question, except the Second Circuit, has held that an internal complaint to the employer can qualify as protected activity under the FLSA. See, e.g., *Minor v. Bostwick Laboratories, Inc.*, 669 F.3d 428 (4th Cir. 2012).
- The complaint must be sufficiently specific to alert a reasonable employer that a FLSA violation is being alleged.

SEVERANCE AGREEMENTS GENERALLY CANNOT INDEPENDENTLY GIVE RISE TO VALID RETALIATION CLAIMS, BUT THEY SHOULD STILL BE HANDLED WITH CARE

- *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006) caused great concern.
- But, subsequent cases limited *Lockheed Martin*.
- Make sure your severance agreement permits the employee to go to the EEOC, or other agency. They just cannot obtain any money themselves from such action, as they are releasing any claim for monetary relief.

IF AN EMPLOYEE ENGAGES IN MORE PROTECTED ACTIVITY AFTER AN EMPLOYER TAKES SOME ACTION AGAINST THEM, DOES THAT MEAN THAT THE EMPLOYER'S ACTION WAS NOT MATERIALLY ADVERSE, AND THUS NOT ACTIONABLE AS RETALIATION?

- In *Bush v. Regis Corp.*, 257 Fed. Appx. 219, 222 (11th Cir. 2007) and *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437, 441-42 (5th Cir. 2007), the Courts of Appeals determined that the plaintiffs had not shown that the challenged allegedly retaliatory actions (written warnings) might dissuade a reasonable employee from filing a charge in part because the plaintiffs had not in fact been deterred from subsequently filing charges of discrimination.
- **But not all courts agree:** See *Turrentine v. United Parcel Service, Inc.*, 645 F. Supp. 2d 976 (D. Kan. 2009) (stating such a rule “defies logic”); see also *Chowdhury v. Bair*, 604 F. Supp. 2d 90, 97 (D.D.C. 2009) (stating that the standard is whether a reasonable person would be dissuaded from engaging in protected activity, whether or not the plaintiff was).

STANDARDS FOR PROTECTION FROM RETALIATION OFTEN DIFFER DRAMATICALLY DEPENDING ON WHETHER THE “OPPOSITION” OR “PARTICIPATION” CLAUSE APPLIES

- **Oppositional Activity Must Be Based On A Good-Faith, Reasonable Belief, And The Activity Itself Must Be Reasonable, Or Else It Loses Its Protection**
 1. **There Is A Good-Faith Reasonable Belief Requirement For Oppositional Activity To Be Protected**
 2. **Oppositional Activity Must Be Reasonable In The Manner It Is Exercised, Or Else It Loses Its Protection**

Example – employee takes confidential information to support case, gets caught, and is fired.

CONTINUED: STANDARDS FOR PROTECTION FROM RETALIATION DEPENDING ON APPLICABLE CLAUSE

- Participation In Protected Activity Generally Need Not Be Based On A Good-Faith, Reasonable Belief To Be Protected, And Need Not Be Reasonable In The Manner Exercised, Although The Law Is Not Uniform On These Points
 1. Courts Generally Hold That The Participation Clause Does Not Include A Good-Faith Reasonable Belief Requirement, Although The Seventh Circuit Disagrees
 2. Courts Generally Hold That The Manner In Which Participatory Activity Is Exercised Need Not Be Reasonable To Be Protected, Although Again The Seventh Circuit Disagrees
- Courts Are Split On Whether Participation In An EEOC Investigation By Giving Statements *Against* The Complainant Is Protected From Retaliation

WHEN IS AN EMPLOYEE'S PARTICIPATION IN AN INTERNAL INVESTIGATION "PROTECTED ACTIVITY" UNDER TITLE VII?

- A.** Participation In A Purely Internal Investigation Is Not Covered By Title VII's Participation Clause

- B.** Participation In An Internal Investigation Triggered By An EEOC Charge Is Covered By Title VII's Participation Clause

- C.** Participation In An Internal Investigation – Even If Not Triggered By An EEOC Charge – May Still Be Covered By Title VII's Opposition Clause Under The U.S. Supreme Court's Pro-employee Holding In *Crawford v. Metro. Gov't of Nashville and Davidson Cty.*, 555 U.S. 271 (2009)

RETALIATORY HARASSMENT IS ACTIONABLE

- See *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012):
 - Noting that every circuit agrees retaliatory harassment is an actionable claim, including the Fifth Circuit
 - Adopting such a claim as a matter of first impression for that court
 - Affirming a seven-figure verdict based on such a claim

RETALIATION AND THE EXHAUSTION REQUIREMENT: A CONFLICT IS BREWING

- *Gupta* and cases like it that carve out an exception to exhaustion for retaliation that occurs after the filing of an EEOC charge.
- There is an argument that the *Gupta* exception to exhaustion no longer applies after the Supreme Court's decision in *Morgan* in 2002.
- The current landscape in the *Gupta v. Morgan* battle: A couple of courts – including the 10th Circuit – have found that the *Gupta* exception no longer applies. Most courts hold that it does. But, many courts have not addressed the issue yet, so stay tuned.

UPDATE ON THIRD-PARTY RETALIATION: *THOMPSON* AND BEYOND

- *Thompson* – 2011 U.S. Supreme Court case green-lights these claims in certain situations.

- **Post-*Thompson* Cases**

1. Dating Relationship
2. Best Friend
3. Spouses Employed At Two Different Employers
4. *Thompson* Extends To The ADEA

2010 DODD-FRANK ACT

■ Some Background:

- SEC created “Office of the Whistleblower” to administer the “Bounty Program”
- Sean McKessy, ex-Altria Group lawyer, is the Chief of the Office of the Whistleblower, and he has a staff of lawyers and investigators
- McKessy’s Office is receiving an average of seven complaints per day since it opened in August 2011 – he says they are generally high quality
- First bounty was awarded in August 2012 in amount of \$50,000.00
- McKessy’s Office will issue a comprehensive annual report every November

2010 DODD-FRANK ACT

■ Who Can Qualify As a Whistleblower?

1. The Basic Definition Of A Whistleblower Under Dodd-Frank
2. Although Dodd-Frank Explicitly Defines A “Whistleblower” In A Way That Only Includes Those Who Provide Information To The SEC, An Exception Has Been Carved Out That Is Rooted In A “Catch-All” Part Of The Law
 - a. Dodd-Frank’s “Catch-All” Provision Providing Whistleblower Status To Employees Who Make Certain Internal Disclosures (*see, e.g., Egan I and Kramer cases*)
 - b. Will Dodd-Frank’s “Catch-All” Provision Swallow SOX? (9/25/12 *Kramer case*)

CONTINUED: DODD-FRANK: WHO CAN QUALIFY AS A WHISTLEBLOWER?

3. Individuals Who Have A Legal Or Contractual Duty To Report Violations Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank
4. Individuals In Compliance-Related Roles Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank
5. Exceptions To The Exclusions From The Definition Of A Whistleblower Under Dodd-Frank
6. Criminal Violators Can Be Whistleblowers Under Dodd-Frank

WHISTLEBLOWER ANTI-RETALIATION PROVISIONS UNDER DODD-FRANK

1. Expansion Of Who Is Protected
2. Expansion Of Protected Activity
3. More Avenues For Enforcement And An Expanded Statute Of Limitations
 - a. Direct Access To Federal Court
 - b. A Long Statute Of Limitations
4. Damages For Retaliation In Violation Of Dodd-Frank

PROCEDURAL ASPECTS OF THE WHISTLEBLOWER BOUNTY

1. Procedures For Submitting Information To The SEC Have Been Simplified
2. Calculating An Award Under The “Bounty Program”

IMPLICATIONS OF THE FINAL RULES ON INTERNAL REPORTING PROCEDURES

1. Internal Reporting Is Not Required
2. Although Not Required, The Final Rules Encourage And Reward Internal Reporting
3. Internal Reporting Alone May Constitute Protected Conduct, If The Report Was Communicated To The SEC By Others, Or The Internal Report Falls Within The “Catch-all” Provision

SOME IMPORTANT POINTS REGARDING DODD-FRANK

- Whistleblowers do not enjoy absolute protection based on a complaint to the Office of the Whistleblower; rather, the “reasonable belief” standard applies
- Case law will start to focus on whether Dodd-Frank’s “catch all” provision, Section 78u-6(h)(1)(A)(iii), essentially makes every SOX retaliation claim actionable under Dodd-Frank too. For example, one month ago in *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424(SRU), 2012 WL 4444820 (D. Conn., Sept. 25, 2012), the court found that claimants who could pursue claims for retaliation under SOX may now do so instead under Dodd-Frank, thereby avoiding OSHA, being subject to a much longer statute of limitations, and potentially better damages.
- Right now, because of the current, generally pro-employee ARB panel, it still makes sense for many SOX claimants to go through OSHA and the administrative process. But, if Mitt Romney wins the election in November and the ARB is again controlled by Republicans, that will almost certainly change. In such case, most SOX claims will be filed directly in federal court.

SOME IMPORTANT POINTS REGARDING DODD-FRANK

- Section 78u-6(h)(1)(A)(iii) also prohibits retaliation against individuals for providing information to a law enforcement officer about the possible commission of a federal offense, which means Dodd-Frank covers situations totally disconnected from corporate fraud
- *Egan I's* ruling on an employer's self-reporting potentially allowing an employee coverage under Dodd-Frank opens the door to protected activity beyond those who directly complain to the Office of the Whistleblower or even SOX related complaints

OTHER ANTI-RETALIATION LAWS CREATED OR STRENGTHENED BY DODD FRANK

1. Private Cause Of Action For Retaliation Under Dodd-Frank Section 1057, Relating To The Consumer Financial Protection Act of 2010
2. Amendment Of The Commodity Exchange Act
3. Amendment Of The False Claims Act

SARBANES-OXLEY UPDATE

■ *Parexel* And Its Prodigy Over The Last Year

1. The Pre-*Parexel* Landscape – SOX claimants almost never won
2. *Parexel* dramatically alters the landscape in May 2011
3. Post-*Parexel* ARB Decisions – An Avalanche Of Favorable Decisions For SOX Complainants over the last year, including some really tricky and interesting ones like *Funke*, and another involving an in-house counsel here in Houston (*Zinn*)
4. Post-*Parexel* Federal Court Decisions That Mention *Parexel*
 - a. *Sharkey*
 - b. *Wiest*
 - c. *Gladitsch*

OTHER RECENT SIGNIFICANT SOX DECISIONS

1. **The ARB Rules That Employer Breaches Of SOX-Mandated Confidentiality May Themselves Give Rise To Liability, Even If The Employee Did Not Suffer A Traditional Adverse Employment Action**

*This case out of Houston against Halliburton includes a cautionary tale about litigation hold notices concerning current employees

2. **The ARB Rules That An Employee's Misappropriation Of Confidential Information May Qualify As Protected Activity Under SOX**
3. **The Ninth Circuit Holds That SOX Does Not Protect Reports Of Alleged Corporate Fraud To The Media**
4. **The First Circuit Holds That SOX Coverage Is Limited To Employees Of Public Companies, but the ARB Disagrees Just Three Months Later**
5. **The ARB Holds That SOX Section 806 Has No Extraterritorial Application**

DODD-FRANK'S 2010 REVISIONS TO SOX, TWO YEARS LATER

1. SOX's Coverage Of Subsidiaries Of Publically Traded Companies Whose Financial Information Is Included In Consolidated Financial Statements
2. SOX's 180 Day Statute Of Limitations
3. SOX's Ban Of Arbitration Agreements – trend is against applying ban retroactively, but case law is not uniform on this point. The most recent case, from September 2012 (*Wong*) applied the ban retroactively, but here in Houston, Judge Keith Ellison refused to do in January 2012 so (*Holmes*)

DAMAGES UNDER SOX

1. Courts Hold SOX Does Not Provide For Mental Anguish Damages
2. The ARB Disagrees, And Holds That SOX Permits The Award Of Mental Anguish Damages

CONCLUSION

- There are many hot areas still developing, both under anti-retaliation laws that have been with us for almost a half-century (Title VII), and those that are relatively new (SOX and Dodd-Frank)
- We hope this presentation and accompanying paper help you in your daily practice
- Feel free to contact us directly with any questions via e-mail or phone

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