Risky Business: Litigating Retaliation Claims

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I. RETALIATION: THE BIG PICTURE

A. Why YOU, as a plaintiffôs attorney, should take on a retaliation case

1. Jury Appeal
   a. Juries can often relate to retaliation in the workplace.
2. Negative Exposure to Defendants
3. Higher Punitive Damages
4. Winning on retaliation v. discrimination claim
   a. Often, the plaintiff can lose on the discrimination claim and win on the retaliation claim.
   b. We often take cases for the retaliation claim, even though the underlying claim of discrimination was fairly weak.
5. An Easy Standard
   a. Judges tend to sustain retaliation claims because all that is required is a reasonable belief that the person was subjected to discrimination.
   b. What are the different standards? ï See Section III

II. WHAT MAKES UP A RETALIATION CLAIM?

A. At Least Three Essential Elements

1. Opposition to discrimination or participation in covered proceedings
2. Adverse action
3. Causal connection between the protected activity and the adverse action

III. FEDERAL DISCRIMINATION STATUTES WITH ANTI-RETALIATION PROVISIONS

A. Title VII of the Civil Rights Act of 1964[i]

1. Prohibits employment discrimination based on race, color, religion, sex, or national origin[ii]
2. Retaliation provision
   a. Prohibits an employer from retaliating against an employee who has ñmade a charge, testified, assisted or participated inò any charge of unlawful discrimination under this statute.[iii]
   b. Standard
      i. To make a prima facie claim of retaliation under Title VII, a plaintiff must prove:[iv]
         (1) He engaged in an activity protected by Title VII
         (2) This exercise of protected rights was known to the employer

(3) The employer thereafter took adverse employment action against the plaintiff;
And
(4) There was a causal connection between the protected activity and the adverse employment action.

ii. If the plaintiff establishes a prima facie case of retaliation, ñthe burden shifts to the defendant to set forth a legitimate, non-retaliatory reason for its actions; at that point, the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation.ò[v]

B. Age Discrimination in Employment Act of 1967 (ADEA)

1. Protects individuals who are 40 years of age or older
2. Retaliation provision
   a. Standard is identical to Title VII.[vi]

C. Title I and Title V of the American With Disabilities Act (ADA)

1. Prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments
2. Retaliation provision
   a. Standard is similar to a Title VII claim.
      i. To make a prima facie claim of retaliation under ADA, a plaintiff must prove:
         (1) Involvement in a protected activity
         (2) An adverse employment action
         And
         (3) A causal link between the two.[vii]
      ii. A plaintiff may attempt to prove his or her retaliation claim under the same burden-shifting framework as a Title VII retaliation claim.[viii]

D. **Section 501 and 505 of the Rehabilitation Act of 1973[ix]**

1. Prohibit discrimination against qualified individuals with disabilities who work in the federal government
   a. For example, Section 501 is the exclusive remedy for a discrimination claim on the basis of a handicap if you are employed by the Postal Service.[x]
2. Retaliation provision

a. Does not contain its own anti-retaliation provision, but it expressly incorporates the anti-retaliation provision found in Title I of the ADA.[xi] See Section III, C.

E. Family Medical Leave Act of 1993 (FMLA)[xii]

1. Entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.[xiii]
2. Retaliation provision
   a. Standard
      i. To make a prima facie claim of retaliation under FMLA, a plaintiff must prove:
         (1) he availed himself of a protected right under the FMLA,
         (2) he was adversely affected by an employment decision, and
         (3) there was a causal connection between the protected conduct and the adverse employment action.[xiv]

      ii. Note: FMLA retaliation claim requires the employee to prove discriminatory or retaliatory intent while an FMLA interference claim only requires the employee to prove that the employer denied him entitlements provided by the FMLA.[xv]

F. Fair Labor Standards Act (FLSA)

1. Prohibits an employer from discharging or in any other manner discriminating against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.
2. Retaliation provision
   a. Standard
      i. To make a prima facie claim of retaliation under FLSA, a plaintiff must prove:
         (1) Participation in a protected activity
         (2) Employment action disadvantaging plaintiff
         (3) Causal connection between the protected activity and the adverse employment action

IV. ASSESSING YOUR RETALIATION CLAIM

A. ***Is there really an "adverse" action?***

1. It may seem adverse to the client, but not under the case law.
2. Case law
   a. Burlington Northern & Santa Fe Railway Co. v. White[xvi] - In this 2006 landmark case about workplace gender discrimination and retaliation, the Supreme Court clarified and expanded the definition of what constitutes an adverse employment action for a retaliation claim.
      i. Facts: Plaintiff Sheila White was hired by Burlington Northern as a ñtrack laborerò and later became a forklift operator. During her employment, White complained to BNSF officials that her immediate supervisor had repeatedly told her that women should not be working in the department and made other insulting and inappropriate remarks to her in front of her male colleagues. Whiteôs supervisor was suspended and BNSF removed White from forklift duty and back to track laborer tasks stating that Whiteôs co-workerôs had complained that, in fairness, a ñómore senior manôò should have the ñless arduous and cleaner jobò of forklift operator. White filed an EEOC complaint, claiming that her reassignment was unlawful gender-based discrimination and retaliation for her having earlier complained about her supervisor. She filed a second retaliation charge claiming that she had been placed under surveillance and that her daily activities were being monitored. After filing the second complaint, White got into a disagreement with her then immediate supervisor and was suspended without pay for insubordination. White grieved the suspension and was reinstated and awarded back pay. She then filed a third retaliation charge based on the suspension.
      ii. Procedural History: A Federal jury awarded White $43,000 after finding that she had been retaliated against in violation of Title VII of the Civil Rights Act of 1964. BNSF appealed arguing that White had not suffered "adverse employment action," and therefore could not bring the suit, because she had not been fired, demoted, denied a promotion, or denied wages. The Sixth Circuit Court of Appeals found for White, holding that the suspension without pay - even if back pay was eventually awarded - was an "adverse employment action," as was the change of responsibilities within the same job category. The Supreme Court granted certiorari to decide whether Title VIIôs anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. The Court also agreed to characterize how harmful an

act of retaliatory discrimination must be to fall within the provisionôs scope.

iii. **Supreme Court Held:** ***An employer's actions will be considered an adverse employment action if the conduct "would have been materially adverse to a reasonable employee or job applicant," and the action could "dissuade a reasonable worker from making or supporting a charge of discrimination."*** In addition, the Court expanded the scope of the definition of ñadverse employment actionò by stating that it ***"extends beyond workplace-related or employment-related retaliatory acts and harms."*** This expansive definition, therefore, could include things that occur beyond everyday interactions in the office, such as vandalism, refusing to provide post-employment information (such as references), or continually calling or driving by an employeeôs home for intimidation purposes.

B. ***Is there a "causal relationship"?***

1. Three factors to consider
   a. Temporal proximity
   b. Pattern of antagonism
   c. Totality of the evidence

2. Temporal proximity
   a. The primary method to establish causation is by showing temporal proximity.
      i. You should ask, *how far a time is there between the discrimination complaint and the adverse action? If it is too long, then there is a question as to whether there is really a causal relationship.*

   b. Case Law
      i. The Standard

ñTo demonstrate a prima facie case of causation, [a plaintiff] must point to evidence sufficient to create an inference that a causative link exists between [the protected action] and her termination.ò[xvii]
ñWhen the ótemporal proximityô between the protected activity and adverse action is óunduly suggestive,ô this ódis sufficient standing alone to create an inference of causality and defeat summary judgment.ôò[xviii] ñóWhere the temporal proximity is not unusually suggestive, we ask whether the proffered evidence, looked at as a whole, may suffice to raise the inference.ò[xix]

ii. There is no bright line rule as to how much time can pass between the discrimination complaint and the adverse action in order to prove temporal proximity.[xx]

iii. But two days is ñunduly suggestive.ò[xxi]

iv. Two weeks could still survive a causation challenge.

(1) For example, in Ford v. County of Hudson, the New Jersey District Court held that the transfer of plaintiffôs position within two weeks of her interview with the County Law Department, in combination with the entirety of the record, survived defendantôs challenge to the causation prong of the retaliation claim at the summary judgment stage.[xxii]

v. When several weeks have passed between the discrimination and adverse action, causation can still be proven but may depend on the facts of the case.

(1) In Farrell v. Planters Lifesavers Co., the Third Circuit found ñample evidence from which to infer a causal connection between [the plaintiff]'s rejection of [her supervisor]'s advance and her subsequent terminationò a few weeks later.[xxiii]

(2) However, in Bailey v. Commerce Nat. Ins. Services, Inc., the Third Circuit held that the Plaintiff could not satisfy the causation prong of her Title VII retaliation case with temporal proximity of eight weeks between her employer's completion of an investigation into her internal sexual harassment complaint against a manager and her termination, and despite a claimed pattern of antagonism after that complaint.[xxiv]

3. In the absence of temporal proximity, evidence of a pattern of antagonism can satisfy the burden.

a. Standard

i. ñAbsent temporal proximity, ócircumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference.ôò[xxv] ñTo determine the [causation] element, the Third Circuit óhas focused on two main factors in finding the causal link necessary for retaliation: timing and evidence of ongoing antagonism.ôò[xxvi]

b. Case law

i. In Lichtenstein v. University of Pittsburgh Medical Center, the Third Circuit found that ñ[T]he record contains evidence that [a coworkerôs] expressed disagreement with the decision to remove [plaintiffôs supervisor following plaintiffôs complaint]. This statement, when combined with the sudden shift in behavior, permits an inference that newfound hostility resulted from [plaintiff]'s protected activity.ò[xxvii] Though vandalism did not begin until approximately one year after the plaintiff reported her supervisor, a co-workerôs alleged berating of the plaintiff for 19

months following the initial incident with the supervisor ñtends to show that these seemingly unrelated incidents were components of an integrated pattern of retaliation.ò[xxviii]

ii. Meanwhile, in Gladysiewski v. Allegheny Energy, the Third Circuit found that ongoing antagonism that occurred before the filing of plaintiffôs administrative complaint did not support the plaintiffôs causation argument.[xxix]

iii. In Robinson v. Se. Pa. Transp. Auth., the Third Circuit held that a pattern of antagonism existed where plaintiff was subject to a ñconstant barrage of written and verbal warnings . . . , inaccurate point totalings, and disciplinary action, all of which occurred soon after plaintiff's initial complaints and continued until his discharge.ò[xxx]

iv. In Urey v. Grove City College, Third Circuit held that Plaintiff did not satisfy the causation prong by showing ongoing antagonism when she alleged ñthat following her protected activities, her supervisors increasingly began to nitpick her work, subject her to unreasonable deadlines, and criticize her appearance. . . . ñWhen the conduct of which the plaintiff complains ñwas taken in response to her own insubordination, including her failure to adhere to the College's dress code and demonstrate respect for her supervisors[,] . . . the conduct ódid not portend any future retaliation,ô but instead amounted to ódiscrete responses to particular occurrences.ôò[xxxi]

4. When evidence of temporal proximity and a pattern of antagonism are lacking, the court considers the totality of the evidence to evaluate causation.

   a. Standard

   ñTemporal proximity and a pattern of antagonism, however, óare not the exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference.ôò[xxxii]

   b. Case law
      a. In Tamayo v. Deloitte & Touche, the New Jersey District Court held that there was sufficient evidence to find the required inference of a causal connection when 1) the employer fired the employee while she was in the midst of caring for her sick mother, 2) the employer cited the employeeôs absences as one of two primary reasons for terminating her, and 3) a human resources representative suggested that the employee used her motherôs illness as an excuse for her absences.[xxxiii]
      b. Meanwhile, in Hussein v. UPMC Mercy Hosp., the Third Circuit held that Plaintiff did not satisfy his burden to show causation based on the evidence as a whole when he ñprovide[d] little explanation . . . for how a supervisorôs alleged retaliatory animus infected the Hospital's

termination decision, speculating only that the investigation operated under the [supervisor]'s direction.ò[xxxiv]

C. ***Cat Paws Theory of Liability***

1. ***What happens when the person you made the complaint to is different from the person who took the adverse action against you?***
2. Case law
   a. Staub v. Proctor Hospital - In 2011, the Supreme Court addressed the so-called ñcatôs pawò theory of discrimination, which holds that even if the person you made the complaint to did not directly take the adverse action, he may be held liable for a retaliation claim if he made the recommendation to the person who did.[xxxv] In this type of scenario, the first official (typically a supervisor) has a bias against the plaintiff, and he influences/proximately causes the decision of the second official (typically a higher ranking supervisor), who ultimately takes the adverse action against the plaintiff.[xxxvi] Oftentimes, however, the ñultimate decisionmakerò who takes the adverse action does not have an unlawful motive.[xxxvii] Thus, prior to Staub, employers have argued that they should not be held liable so long as the ultimate decisionmaker acted for lawful purposes.[xxxviii]

      i. Facts: Plaintiff, an angiography technician, brought a discrimination claim against his former employer under the Uniformed Services Employment and Reemployment Right Act (USERRA). Staub alleged he had been fired because of his service in the U.S. Army Reserve.

      ii. Procedural History: The case was tried under the Seventh Circuitôs singular influence standard, and initially the jury ruled in favor of the plaintiff, finding that the plaintiffôs military status was a motivating factor in the decision to discharge him, only to be reversed by the Seventh Circuit. On appeal, the Seventh Circuit held that there was insufficient evidence to demonstrate the existence of the requisite singular influence. The Seventh Circuit held that an employer is immune from liability so long as the ultimate decisionmaker relied in part on any information that came from someone other than the biased official. However, the Supreme Court unanimously overturned the Seventh Circuit decision.

iii. The Supreme Court Holding: In his majority opinion, Justice Scalia established the ñcats paw theory of liability,ò holding ñif a supervisor performs an act motivated by [unlawful] animus that is *intended* by the supervisor to case an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liableé ò[xxxix]

iv. The Standard: Thus, under Staub, a plaintiff must establish four elements:
(1) Agency,
(2) Discriminatory motive,
(3) An intent to cause the adverse action in question, and
(4) Proximate causation.

b. Smith v. Bray - In this 2012 case about workplace race discrimination and retaliation, the U.S. Court of Appeals 7th Circuit applied the catôs paw theory of liability to Section 1981 of the Civil Rights Act of 1866.[xl]

i. Facts: Darryl Smith, a technician for Equistar Chemicals alleged racial discrimination and harassment by his supervisor and complained about it to the human resources manager, Denise Bray. Smith went on short-term disability for work-related stress. Smith requested an extension denied by the third-party carrier based on insufficient information from Smith's doctor. Smith did not return to work thereafter and the plant manager instructed Bray to seek permission from corporate headquarters to terminate Smith. Smith was terminated for being absent without leave.

ii. Procedural History: Plaintiff Smith sued Equistar and Bray alleging race discrimination and retaliation in violation of Section 1981. Smith proceeded against Bray individually and Bray was granted summary judgment. Smith appealed Bray's dismissal to the Seventh Circuit, claiming that there was sufficient evidence that Bray caused his termination in retaliation for his complaints of race discrimination.

iii. **The Seventh Circuit Holding:** ***Under 42 U.S.C. Section 1981, an individual can be sued personally when a subordinate with discriminatory motive intentionally causes an unknowing superior to take adverse action against an employee for a discriminatory or retaliatory reason. Thus, "cat's paw" permits a***

finding of liability against an individual with a discriminatory or retaliatory motive who did not make the adverse employment decision, but who provided input or a recommendation to the decision maker who did.

D. ***Is the retaliation claim for something that is part of the person's normal job duties?***

1. Case law
   a. Garcetti v. Ceballos - In this 2006 U.S. Supreme Court case, the Plaintiff government employee thought he was being retaliated against for a memo he wrote that criticized a course of action taken by his employer. The Court ruled, in a 5-4 decision, that because his statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection. [xli]
      i. Facts: Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorneyôs Office, headed by Gil Garcetti. In a pending criminal case, Ceballos determined that an affidavit contained serious misrepresentations. He reported his findings to supervisors and submitted a memorandum recommending dismissal of the case. Despite Ceballosô concerns, his supervisor decided to proceed with the prosecution. The criminal trial court held a hearing on the motion. Ceballos was called by the defense to recount his observations of the affidavit. The trial court denied the motion and upheld the warrant. Ceballos claimed that he was subsequently subjected to a series of retaliatory employment actions including reassignment to a different position, transfer to another courthouse, and denial of a promotion. He initiated an employment grievance, which was denied based on a finding that he had not suffered any retaliation.
      ii. Procedural History: Ceballos brought a section 1983 claim in the United States District Court for the Central District of California, asserting that his supervisors violated the First Amendment by retaliating against him for his memo. The District Court granted summary judgment concluding that because Ceballos wrote his memo pursuant to the duties of his employment, he was not entitled to First Amendment protection for the memoôs contents.

      The Ninth Circuit reversed, holding that Ceballosô criticism of the warrant in the memo constituted protected speech under the First Amendment because the memo dealt with what he thought to be

governmental misconduct and the court believed its subject was "inherently a matter of public concern.ò

The Supreme Court reversed, holding that the First Amendment does not prevent employees from being disciplined for expressions they make pursuant to their professional duties.

iii. **Supreme Court Held:** Employees may receive First Amendment protection. Ceballos, however, was not entitled to First Amendment protection because he did not act as a citizen when he wrote the memo that addressed the proper disposition of a pending criminal case; he instead acted as a government employee. Restricting such speech, which "owes its existence to a public employee's professional responsibilities," did not in the Court's view violate any rights that the employee had as a private citizen. Instead, the restrictions were simply the control an employer exercised "over what the employer itself has commissioned or created."

The Court also rejected the argument that employers could restrict the rights of employees "by creating excessively broad job descriptions." Instead, the Court observed that formal job descriptions do not always correspond to actual expected duties, "and the listing of a given task in an employeeôs written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employeeôs professional duties for First Amendment purposes."

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[i] 42 U.S.C. s.2000e *et seq.*

[ii] See http://www.eeoc.gov/facts/qanda.html.

[iii] 42 U.S.C. § 2000e-3(a).

[iv] See Ford v. General Motors Corp., 305 F.3d 545 (6th Cir. 2002).

[v] See Lintz v. Potter, Slip Copy, 2012 WL 2995674 E.D.Cal. at *24 (citing Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1108 (9th Cir.2008); accord Nilsson, 503 F.3d at 954).

[vi] Gill v. District of Columbia, --- F.Supp.2d ----, 2012 WL 2552733 D.D.C.,2012. At FN3.

[vii] See Lintz v. Potter, Slip Copy, 2012 WL 2995674 E.D.Cal., at *24.

[viii] Id.

[ix] See 29 U.S.C. s. 791.

[x] See Lintz v. Potter, Slip Copy, 2012 WL 2995674 E.D.Cal., at *16.

[xi] Id., at *24.

[xii] See 29 U.S.C.A. s. 2615.

[xiii] See http://www.dol.gov/whd/fmla/.

[xiv] Pagel v. TIN Inc. --- F.3d ----, 2012 WL 3217623.

[xv] See 29 U.S.C.A. § 2612(a)(1)(D).

[xvi] 126 S. Ct. 2405 (2006).

[xvii] Lichtenstein v. University of Pittsburgh Medical Center, 2012 WL 3140350, at *10 (3d Cir. 2012).

[xviii] Id. (citing LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 232 (3d Cir. 2007).

[xix] Id.

[xx] Id.

[xxi] Id. (citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989).

[xxii] Ford v. County of Hudson, 2012 WL 2522954, *10 (D.N.J. 2012).

[xxiii] Farrell v. Planters Lifesavers Co., 206 F.3d 271 (3d Cir. 2000).

[xxiv] See Bailey v. Commerce Nat. Ins. Services, Inc., 267 F. Appôx 167 (3d Cir. 2008).

[xxv] Id. (citing Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997).

[xxvi] Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 288 (3d Cir. 2001).

[xxvii] Jensen v. Potter, 435 F.3d 444, 450-51 (3d Cir. 2006).

[xxviii] Id. at 444, 451 (3d Cir. 2006).

[xxix] Gladysiewski v. Allegheny Energy, 398 F. Appôx 721, 724 (3d Cir. 2010).

[xxx] Robinson v. Se. Pa. Transp. Auth., 982 F.2d 892, 895 (3d Cir. 1993)

[xxxi] Urey v. Grove City College, 94 F. Appôx 79 (3d Cir. 2004) (citing Weston v. Pennsylvania, 251 F.3d 420, 432 (3d Cir. 2001).

[xxxii] Bailey v. Commerce Nat. Ins. Services, Inc., 267 F. Appôx 167 (3d Cir. 2008) (citing Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997).

[xxxiii] See Tamayo v. Deloitte & Touche, LLP, 2007 WL 135975 (D.N.J. 2007).

[xxxiv] Hussein v. UPMC Mercy Hosp., 466 F. Appôx 108 (3d Cir. 2012).

[xxxv] Staub v. Proctor Hosp., 131 S.Ct. 1186 (2011).

[xxxvii] Eric Schnapper, *Review of Labor and Employment Law Decisions from the United States Supreme Court's 2010-2011 Term*, 27 ABA Journal of Labor & Employment Law 329, 346-47 (2012).

[xxxviii] Id.

[xxxix] 113 S. Ct 1186, 1194 (2011)(emphasis in original).

[xl] No. 1:09-cv-3615 (7th Cir., May 24, 2012).

[xli] 547 U.S. 410 (2006).