

Excerpt from "Chapter 16. Representing the Executive" by Wayne R. Outten, appearing in Executive Compensation, editors Yale D. Tauber and Donald R. Levy, copyright © 2003 The Bureau of National Affairs, Inc. Reprinted by permission.

II. HANDLING DISPUTES INVOLVING CURRENT EMPLOYEES

A. INTRODUCTION

Representing employees who are involved in disputes with their employers while still employed raises special practical, tactical, procedural, ethical, and legal issues. Most of those issues complicate matters for the employee and the employee's counsel, but some of them are beneficial. Some of those issues arise only in litigated disputes, but most of them arise in disputes generally, whether or not they are the subject of litigation.

B. PRACTICAL ISSUES

1. Effect on Employees.

An employee who is involved in a dispute with his or her current employer typically suffers even more psychological stress and distress during the dispute than an employee involved in a dispute with a former employer. Going to work every day can be extremely uncomfortable and frustrating.

Usually, the employee's superiors are aware of the dispute and are upset with the employee for being involved in the dispute. This situation is exacerbated when the employee has made allegations against particular superiors, is exacerbated even more when the employee has filed formal charges against or sued the employer, and is especially exacerbated when the employee has filed formal charges against or sued particular superiors.

Moreover, other people in the company, including colleagues, may know about the dispute and have strong opinions about the merits and wisdom of the employee's course of conduct. Some colleagues may be supportive, which can be quite comforting to the employee. Often, however, some colleagues disagree with the employee's position, particularly when it raises issues of the employee's compensation, position, or other treatment relative to others in the workplace or when it threatens to involve the colleagues in the dispute.

In such circumstances, an employee's concerns about a hostile environment, disparate treatment, and retaliation are well founded. These subjects are discussed below.

2. Employee Reaction.

Given these concerns, many employees choose not to pursue problems and disputes in the workplace. Rather, they suffer in silence, confide only to persons they can trust, or insist on confidentiality from anyone to whom they disclose the matter.

This syndrome is especially common with disputes that may involve embarrassing or private matters. For example, it is well-known that many victims of sexual harassment decide not to disclose the problem or pursue a remedy due to such concerns. Of course, the Supreme Court's decisions in 1998 in Faragher¹ and Ellerth² were fashioned in large part to encourage employers to set up policies and procedures to promote and facilitate the reporting of sexual harassment problems and to encourage employees to use such procedures.

Some employees react to harassment by underplaying or masking the problem. It is common, for example, for employees who believe they are being discriminated against based on sex, race, etc., in compensation or promotion matters to decline to label the problem as discrimination. Instead, consciously or unconsciously, they assess and address the problem in terms of basic unfairness, rather than discrimination. Sometimes, as discussed below, doing so is tactically beneficial, at least in the early stages of a problem.

3. Employer Reaction.

Some employers deliberately retaliate against employees who pursue disputes against them, as unpleasant and unfair as that may seem. Some employers consciously turn a blind eye to retaliatory conduct by supervisors. Often, employers fail to take affirmative steps to punish or discourage such retaliatory conduct.

Obviously, when an employee's complaint constitutes protected conduct, an employer that fails to prevent retaliation risks a claim of retaliation on top of the underlying complaint or claim. (Retaliation claims are discussed more fully below.) Indeed, retaliation claims are on the increase, and employees frequently succeed with such claims even when the underlying complaint of discrimination or harassment fails.

The obvious lesson for employers is that they should make diligent, good-faith efforts to prevent retaliation and to correct any retaliation that may occur. For example, employers should educate supervisors that retaliation is unlawful in certain circumstances and is unfair in any event, especially when an employee has made a good-faith, reasonable complaint. Such actions by employers not only help limit risk and avoid claims but also make good sense in terms of employee morale and satisfaction.

4. Role of Employee's Counsel.

¹ Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

² Ellerth v. Burlington Industries, 118 S. Ct. 2257 (1998).

Attorneys for employees are accustomed to helping their clients deal with the stresses involved in employment disputes, including a client's feelings of rejection, betrayal, hurt, anger, and cynicism. Such stresses are multiplied when the client is still working for the employer and must deal daily with the people and institution that have caused the problems, especially when the employee perceives retaliation from those people and the institution.

Thus, the employee's counsel must be especially understanding and supportive of the client during such a dispute, while maintaining the necessary professional objectivity and distance. The counsel can help by making sure that the client anticipates what may happen once a complaint is made and that the client is prepared to deal with it. Of course, the counsel should apprise the client of relevant laws against retaliation, while also apprising the client of the limitations of such laws (e.g., their inapplicability to some types of unpleasant but legal behavior at work, the difficulty of proving retaliatory motive, and the burdens of pursuing a retaliation claim).

5. The Stay-or-Go Decision.

Recognizing the risks of fighting with a current employer, some employees decide not to pursue their complaints at all, preferring to live with the problems. Sometimes, employees decide to defer addressing the problems until they get worse or until some more propitious time, or they decide to wait and gather more information that might be helpful in understanding or addressing the problems. Often, they try to find a way around the problems, perhaps by seeking a transfer or reassignment within the company.

If the employee decides to stay and try to address the problems, the employee's counsel can play an important role in helping develop a plan of action. Many employees, even sophisticated employees, lack the ability to identify, evaluate, and choose the options available to them. In any event, counsel can provide an objective sounding board.

Many employees decide that the best course is simply to leave the job rather than to pursue their complaints. They may decide to just get on with their lives and try to start over someplace else. Of course, that course may not take into full account the possibility that the same kinds of problems, such as systemic glass-ceiling issues in many industries, are likely to exist elsewhere as well.

Many decide to leave the job and then pursue their complaints as they leave or after leaving, perhaps in the context of negotiating a severance agreement. In addition, when a current employee asserts a claim and the parties then enter into a negotiated resolution of the claim, one of the terms of the deal may be the termination of employment. In fact, termination of employment with a severance/settlement package is sometimes a key objective of the employee when asserting a claim.

6. Problem Solving and Dispute Resolution.

For the current employee who wants to try to solve problems or resolve disputes, a gradual escalation approach is best. Typically, this means that the employee, with guidance from counsel, tries to handle the matter informally. In some companies, the employee may have available company-established internal dispute resolution procedures, which may begin with informal measures, leading to mediation and arbitration steps. Even in the absence of such company-established procedures, the employee and the employer may agree to mediation, which is especially well-suited for current employees. Finally, some disputes may go to arbitration, pursuant to a post-dispute agreement to arbitrate the particular dispute or pursuant to a general pre-dispute agreement to arbitrate contained in an employment agreement or other agreement between the parties.

These problem solving and dispute resolution methods are discussed in considerable detail in Section III of this chapter on Negotiations and ADR in Employment Disputes.

C. ABSENCE FROM WORK

The current employee involved in a dispute with the employer sometimes wants and/or needs time away from work. The employee may feel the need to get away from a harassing or abusive boss for a while, may want time to reflect on events, or may need time to consult with an attorney, doctor, or other professional. Of course, the employee can always use personal, sick, or vacation days for such purposes; typically, such absences are with pay. Sometimes, when there has been a troublesome episode at work, such as a verbal assault or an instance of sexual harassment by a superior, the employer may support the employee's need for some time off.

The federal Family and Medical Leave Act³ entitles eligible employees to up to 12 weeks of unpaid leave due to a serious health condition. An employee may be eligible for such leave time if, for example, a dispute at work has caused the employee such emotional distress that medical attention is required. The FMLA prohibits employers from interfering with, restraining, or denying the exercise of any right protected by the statute.⁴ In extreme cases, the employee may need to go on disability leave.

The employee's counsel and the employer's counsel may agree on occasion that it is appropriate for the employee to stay away from work, with full pay and benefits, during negotiations over a dispute, especially when it is anticipated that the resolution may result in the termination of employment.

D. RETALIATION

1. Generally.

³ 29 U.S.C. § 2601 et seq.

⁴ 29 U.S.C. § 2615(a).

For current employees more than former employees, retaliation is a major issue. Former employees can, of course, be the victims of retaliation and can assert legal claims for such retaliation.⁵ But most retaliation claims arise in connection with current employees.

Retaliation claims against employers are common. For example, during the late 1990s the Equal Employment Opportunity Commission received about 20,000 retaliation claims each year, and more than 25% of all charges filed with the EEOC included retaliation claims.

It is well known that employees sometimes lose their underlying discrimination claims on summary judgment or at trial, while winning their retaliation claims. Courts and juries are generally more receptive to retaliation claims than to discrimination claims. And the damages awarded for retaliation can be very substantial, including punitive damages.

2. Retaliation Laws.

Many federal and state statutes prohibit retaliation against employees who engage in certain protected conduct. The protected conduct might consist of complaining of discrimination, blowing the whistle on illegal or unsafe conduct, or engaging in other conduct that the law seeks to encourage or protect (e.g., union activity or jury duty).

Anti-retaliation provisions exist in the federal anti-discrimination statutes.⁶ They also exist in many other federal statutes.⁷ Many federal statutes protect employees and other employees who blow the whistle on public health and safety issues.⁸ Other federal statutes protect employees and other employees who blow the whistle in other contexts.⁹

⁵ See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

⁶ E.g., Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623; Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3; Vocational Rehabilitation Act, 29 U.S.C. §§ 793, 794.

⁷ E.g., Employee Polygraph Protection Act, 29 U.S.C. § 2002; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140; Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 215(a), 216(b); Family and Medical Leave Act (FMLA), 29 U.S.C. § 2614(a); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 948(a); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855; National Labor Relations Act (NLRA), 29 U.S.C. § 158, Occupational Safety and Health Act (OSHA), 29 U.S.C. § 660(c); and Railroad Employers Act, 45 U.S.C. § 60. Additional protections against retaliation by employers against employees exist under the Federal False Claims Act, 31 U.S.C. § 3730(h).

⁸ See, e.g., Asbestos School Hazard Detection & Control Act, 20 U.S.C. § 3608; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Clean Air Act, 42 U.S.C. §§ 7401, 7622; Energy Reorganization Act a/k/a Atomic Energy Act, 42 U.S.C. § 5851; Federal Mine Safety & Health Act, 30 U.S.C. §§ 815, 820(b); Federal Railroad Safety Act, 45 U.S.C. § 441(a), (b) (1); Federal Water Pollution Control Act, 33 U.S.C. § 1367; International Safe Container Act, 46 U.S.C. § 1506; Occupational Safety & Health Act, 29 U.S.C. § 660(c); Safe Drinking Water Act, 42 U.S.C. § 300j-

Virtually every state has an anti-discrimination statute, and those statutes invariably have anti-retaliation provisions. About 40 states have enacted whistleblower protection statutes, though they range from very narrow¹⁰ to very broad.¹¹ And some states recognize public policy grounds for wrongful discharge cases, which may be based on the employee's engaging in conduct that public policy recognizes should be protected.

9(i); Solid Waste Disposal Act, 42 U.S.C. § 6971; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201, 1293; Surface Transportation Assistance Act, 49 U.S.C. § 2305; and Toxic Substances Control Act, 15 U.S.C. § 2622.

⁹ See, e.g., Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(d); Conspiracy to Obstruct Justice Act, 42 U.S.C. § 1985(2); Consumer Credit Protection Act, 15 U.S.C. § 1674(a); Department of Defense Authorization Act, 10 U.S.C. § 2409; Federal Deposit Insurance Act, 12 U.S.C. § 1831(j); Federal Property and Administrative Services Act, 41 U.S.C. § 251; Jury Duty Act, 28 U.S.C. § 1875; Major Fraud Act, 18 U.S.C. § 1031(g); and Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 2021(b), 2024(c).

¹⁰ See, e.g., *New York Labor Law § 740* (protecting only those private sector employees who blow the whistle on employer misconduct that *both* (i) violates a law, rule, or regulation and (ii) creates and presents a substantial and specific danger to public health or safety); *Bordell v. Gen. Elec. Co.*, 622 N.Y.S.2d 1001 (3d Dep't 1995) (nuclear reactor employee's reasonable belief there was radiation leak insufficient because § 740 requires "actual" violation of law, rule or regulation, not mere supposition that violation has occurred), *aff'd*, 644 N.Y.S.2d 912 (1996); *Rotwein v. Sunharbor Manor Residential Health Care Facility*, 695 N.Y.S.2d 477 (Sup. Ct., N.Y. Cty. 1999) (opposing Medicare billing improprieties did not involve immediate threat to public health and safety).

¹¹ See, e.g., *Mich. Comp. Laws Ann. § 17.428* (protecting employees who report or are "about to report ... a violation or a suspected violation of a law ... to a public body"); *Dudewicz v. Norris Schmid, Inc.*, 480 N.W.2d 612 (Mich. 1991) (applying Michigan whistleblower statute even though the violation of law did not pose a risk to the public at large, holding that auto dealership employee had the right to press criminal charges against manager who assaulted plaintiff in dispute over performing work for customer with warranty).

3. Retaliation under Title VII.

Undoubtedly, the most common retaliation claims are those that arise under Title VII of the Civil Rights Act of 1964, as amended. Section 704(a) of Title VII¹² (and parallel provisions of other employment statutes) makes it unlawful to retaliate against an individual: (a) “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title], or (b) “because he has opposed any practice made an unlawful employment practice by this [title].” The former section is known as the “participation” clause; the latter, the “opposition” clause.

To establish a claim for unlawful retaliation, a plaintiff must prove three things: (1) the employee engaged in some protected activity; (2) the employer subjected the employee to some adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action.¹³

Broadly speaking, participation clause protection is narrower (covering fewer activities) but deeper (more categorically protected), while opposition clause protection is broader but shallower. The participation clause protects any persons who have participated in any manner in Title VII proceedings (or the necessary precursors to such proceedings).¹⁴ Generally, under the participation clause, the plaintiff is protected regardless of whether the complaint of discrimination was meritorious or whether the plaintiff had a reasonable, good-faith belief that the employer discriminated.¹⁵

The opposition clause is more narrowly applied. Generally, the plaintiff’s statements or conduct must have been objectively reasonable and in good faith.¹⁶ Accordingly, an employee who makes a reasonable, good-faith complaint about

¹² 42 U.S.C. § 2000-e3(a).

¹³ *E.g.*, Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025 (7th Cir. 1998); King of Town of Hanover, 116 F.3rd 965 (1st Cir. 1997); Grimes v. Texas Dep’t of Mental Health & Mental Retardation, 102 F.3d 137 (6th Cir. 1997); Little v. United Tech., 103 F.3d 956 (11th Cir. 1997).

¹⁴ Glover v. S. Carolina Law Enforcement Division, 170 F.3rd 411 (4th Cir. 1999) (“those who testify in Title VII proceedings are endowed with ‘exceptionally broad protection.’ . . . [I]t is followed by the phrase ‘in any manner’ – a clear signal that the provision is meant to sweep broadly”); Merritt v. Dillard Paper Co., 120 F.3rd 1181 (11th Cir. 1997) (the plaintiff was discharged after admitting in deposition that he had engaged in sexually harassing activities; the discharge was unlawful because it was based on the fact and content of his testimony, rather than the harassing conduct); McKenzie v. Illinois Dep’t of Transp., 92 F.3rd 473 (7th Cir. 1996) (the employer threatened employees not to provide affidavits that would assist plaintiff in her lawsuit; if the employer had carried out its threat, the employees would have had a claim for retaliation for participating in plaintiff’s EEO lawsuit.)

¹⁵ *See* Glover v. S. Carolina Law Enforcement Div., 170 F.3rd 411 (4th Cir. 1999). *But see* Learned v. City of Bellevue, 860 F.2d 928 (9th Cir. 1988).

¹⁶ *See* Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3rd 155 (2d Cir. 1999); Kubicko v. Ogden Logistics Serv., 181 F.3rd 544 (4th Cir. 1999).

discrimination is protected against retaliation, even if the discrimination complaint itself lacks merit.¹⁷

The employee may not be protected if the complaint is too vague or indefinite or is not about discrimination.¹⁸ On the other hand, the employee might forfeit protection by going too far in exercising the right to oppose, such as stealing company documents, disclosing confidential information, or acting in an insubordinate manner.¹⁹

To have a retaliation claim, the employee must have suffered a judicially cognizable adverse employment action. A few courts have held that only “ultimate employment decisions ... such as hiring, granting leave, discharging, promoting, or compensating” are protected against retaliation.²⁰ Under this view, documented reprimands, threats of termination, and negative performance reviews do not support a retaliation claim;²¹ neither does a denial of a lateral transfer to a different work location.²²

Most courts, however, find a broader range of employment actions to be protected, looking simply to “whether the terms of ... employment were adversely affected” in a material way.²³ Under this prevailing view, employees are protected against subtle acts of retaliation, such as exclusion from meetings and reduction of job duties,²⁴ toleration of harassment,²⁵ and disadvantageous transfers, assignments, or negative job evaluations.²⁶

¹⁷ See Bigge v. Albertsons Inc., 894 F.2d 1497 (11th Cir. 1990).

¹⁸ See Wolf v. Coca-Cola Co., 200 F.3d 1337 (11th Cir. 2000); Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3rd 276 (2nd Cir. 1998).

¹⁹ See Laughlin v. Metropolitan Wash. Airports Authority, 149 F.3rd 253 (4th Cir. 1998); Douglas v. DynMcDeremott Petroleum Operations Co., 144 F.3rd 364 (5th Cir. 1998); Nelson v. Pima, 83 F.3rd 1975 (9th Cir. 1996).

²⁰ Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)).

²¹ 104 F.3d at 707.

²² See Burger v. Cent. Apartment Mgmt., Inc., 168 F.3d 875 (5th Cir. 1999); Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997).

²³ Preda v. Nissho Iwai Am. Corp., 128 F.3d 789, 791 (2d Cir. 1997) (reversing defense grant of summary judgment in retaliation claim where alleged adverse actions were exclusion from meetings and reduction of job duties, such as to largely clerical tasks, because such allegations “raised a material question of fact about whether the terms of his employment were adversely affected in retaliation for protected activity”).

²⁴ See Preda, 128 F.3d 789.

²⁵ See Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1996) (“In addition to discharges, other adverse actions are covered by § 2000e-3(a),” including “employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees”).

To establish a retaliation claim, employees must establish not only protected conduct and an adverse action, but also a causal nexus between the two. Obviously, this means at a minimum that the employer's relevant decision-makers must have known about the protected conduct. Mere proximity in time may be enough to create a strong inference of causation. But the longer the time between the protected conduct and the adverse action, the weaker the inference generally. Even so, a delay may be explained away, for example, when it takes a while for a superior to have an opportunity to retaliate, such as by giving a poor annual evaluation or a small annual bonus.

²⁶ See Wyatt, 35 F.3d 13; Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (“Transfers of job duties and undeserved performance ratings ... constitute ‘adverse employment decisions’ cognizable under this section” as retaliation).