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Retaliation Claims: Recent Cases Are a Reminder of Their Broad Scope

by Jillian Barron

My employer retaliated against me because: I complained about sexual harassment; I reported a supervisor's discriminatory treatment of my coworkers; I provided negative information about a manager during an investigation of alleged discrimination. Retaliation claims have become more numerous and can be more difficult to dismiss on summary judgment than claims based on the discrimination out of which the retaliation allegedly arises. Why? At least in part because once an employee complains of harassment or discrimination, *any* subsequent management of the employee's performance or conduct, no matter how legitimate, can be argued as retaliatory based on the complaint. In addition, courts have held that unlawful retaliation may occur even when the underlying substantive complaint of discrimination is rejected. Perhaps for these reasons, retaliation charges have constituted the largest portion of the EEOC's case load for several years now.

State and federal law require employees to prove the same three elements to establish a *prima facie* case of retaliation: (1) the employee engaged in statutorily-protected activity; (2) the employee suffered an adverse employment action; and (3) there was a causal relationship between the two. Despite the established nature of these requirements, court decisions continue to refine and in some instances expand the circumstances in which retaliation claims may be valid. Two recent cases, one state, the other federal, illustrate some factors to keep in mind.

In ***Lodis v. Corbis Holdings, Inc.***, 172 Wn. App. 835, 292 P.3d 779 (2013), a Washington state court for the first time addressed whether an employee whose job duties include responsibility to ensure the employer's compliance with antidiscrimination laws engages in statutorily-protected activity when he or she reports concerns about apparent discrimination against other employees. Lodis, a vice president of human resources ("HR"), alleged he was terminated based on his age and in retaliation for expressing concern about age-related comments by the company's CEO. The trial court dismissed Lodis' retaliation claim on summary judgment, finding that his warnings to the CEO about potential age discrimination were part of his job duties as an HR manager and therefore were not protected activity. Lodis went to trial only on his age discrimination claim, which was rejected by a jury. He then appealed the dismissal of his retaliation claim. The appeals court began its analysis of the issue with the premise that the Washington Law Against Discrimination ("WLAD") is to be liberally construed. Accordingly, the court reasoned, the WLAD's prohibition on retaliation against "any person" who has "opposed" discriminatory practices must be read to protect employees who work in HR or other positions that require them to advise their employer about discriminatory practices. Indeed, the court stated, such employees are often in the best position to oppose an employer's discriminatory activities, and should be protected when they do so. In this regard, the appeals court approved a broad reading of "opposition" activities that would include not only objecting to or challenging, but also asking or answering questions about practices that appear discriminatory. Importantly, while concluding Lodis' retaliation claim was therefore improperly dismissed, the court did not find retaliation had occurred, but simply held that the claim must go to a jury.

Applying federal law, the Ninth Circuit Court of Appeals likewise recently reversed summary judgment on a retaliation claim. ***Westendorf v. West Coast Contractors of Nevada, Inc.***, __ F.3d __ (9th Cir. 2013). Westendorf, a construction company employee, was subjected to several gender-based comments over a six-month period, beginning with a reference by her supervisor to her duties as "girly work," followed by a male coworker's remarks about a large-breasted woman he called "Double D," whether women "got off" when they used certain kinds of tampons, and that "women were lucky because [they] got to have multiple orgasms." The coworker also told Westendorf on multiple occasions that she had to clean their work trailer while wearing a French maid's costume, and said "f___ you" to her a few times during a disagreement. Although her supervisor apologized to her for his "girly" comment, he did nothing to stop her coworker's comments and just smiled when she asked him to intervene. Westendorf reported the conduct to the company president, who initially seemed responsive, interrogating her supervisor and warning him that he needed to address any future offensive comments by the coworker. When she came back to the president a second time, however, he said he was tired of listening "to all this," she obviously had a problem with her supervisor, and it would be best if she left. The district court dismissed Westendorf's claims for sexual harassment and retaliatory termination on summary judgment. On appeal, the Ninth Circuit agreed the alleged conduct was insufficient to establish a harassment claim; it noted there had only been about four occasions of sexually-offensive remarks, the harassment was not physical, and Westendorf did not contend her work suffered because of the conduct. Nevertheless, the appeals court concluded Westendorf could have *reasonably believed* the conduct constituted unlawful harassment, in which case her complaints about it would be protected activity. Consequently, she was entitled to proceed with her retaliation claim.

Lodis and Westendorf reaffirm the broad scope of the persons and conduct protected under the retaliation laws. The cases also indicate how difficult it is for employers to secure dismissal of retaliation claims on motions for summary judgment. At the same time, the cases recognize that employers can refute retaliation claims by establishing legitimate, nondiscriminatory reasons for adverse action taken against an employee who has engaged in protected activity. Neither Washington nor federal law prohibits disciplinary action, including termination, that is justified by a complaining employee's poor performance or inappropriate conduct. Nor is a complaining employee entitled to preferential treatment over others who have not engaged in protected activity. To minimize the potential for retaliation claims and maximize the ability to successfully defend them when they arise, employers should:

- Educate supervisors and managers about the kinds of conduct that are protected, as well as the actions that may be considered retaliatory. Require that HR be informed of any complaints that are made.
- Address complaints of discrimination or harassment promptly, take corrective action if appropriate, and remind those accused of misconduct that retaliatory responses are unacceptable and will be grounds for discipline.
- Ensure that supervisors consistently document performance problems of their subordinates on an ongoing basis. Such documentation will serve as evidence supporting decisions made with respect to employees who have engaged in protected activity, and can counter claims that those decisions are retaliatory.