STARNES | DAVIS FLORIE LLP

LABOR & EMPLOYMENT BULLETIN

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Special Retaliation Edition in Response to Recent Spike in Retaliation Claims

Retaliation Claims Take the Lead
EEOC Charges Reach An All-Time High in 2010

The U.S. Equal Employment Opportunity Commission ("EEOC") recently released statistical data on EEOC Charges filed during fiscal year 2010, which ended September 30, 2010. The data revealed that workplace discrimination complaints against private sector firms reached an all-time high in 2010. More specifically, the total number of filings in 2010 was 99,922, which was a seven percent increase over fiscal year 2009. The EEOC reported that it received more employment discrimination complaints in fiscal year 2010 than in any other year of its existence. The almost 100,000 charges filed resulted in over $400 million in payments from employers. In fiscal year 2010, the EEOC filed 250 lawsuits, resolved 285 lawsuits and resolved 104,999 private sector charges. The EEOC's data revealed that it secured more than $404 million in monetary awards (the highest level of monetary relief ever obtained by the Commission) through the EEOC's enforcement, mediation, and litigation programs.

According to the EEOC's data, all major categories of charge filings in the private sector (which include charges filed against state and local governments) increased. These included charges alleging discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; and the Genetic Information Nondiscrimination Act (GINA). The EEOC received 201 charges under The Genetic Information Nondiscrimination Act, which was in its first year of enforcement. Although claims of work-related racial discrimination rose seven percent, the greatest increase came in the area of disability discrimination, which rose seventeen percent. The most notable increase, however, was the eight percent increase in retaliation claims. For the first time ever, retaliation claims under all statutes (36,258) surpassed race (35,890) as the most frequently filed charge. Historically, race had been the most frequently filed charge since the EEOC became operational in 1965; however this increase in retaliation claims is likely because retaliation claims have tended to fare better in front of juries and have resulted in higher settlements than complaints about underlying acts of discrimination.

The 2010 increase in filed charges is most likely attributable to the strained economy. Historically, anytime the country has entered a recession or the economy has been unstable, the number of filings has spiked. Another potential cause for last year's increase could be that the EEOC had a larger budget and staff than ever before. The agency used a portion of the budget to educate employees about their workplace rights and to streamline the filing process, making it more "user-friendly." Given this upward trend in the number of charges filed and the continued existence of the struggling economy, employers should remain vigilant in their adherence to all anti-discrimination policies and in their education of employees on such policies.

- Breanna Harris

Alabama Supreme Court Upholds $50,000 Retaliatory Discharge Claim in Workers' Compensation Case

In *Ex parte Wood*, the Alabama Supreme Court reinstated a trial court verdict for $20,000 in back pay and $30,000 in emotional distress damages for an employee who claimed he was discharged for filing a workers' compensation claim. *Ex parte Wood*, No. 1090877, 2010 WL 4272676, *1 (ALA. OCT. 29, 2010).

This case arose when the plaintiff returned to work following a surgery for an on-the-job injury. Plaintiff continued to have problems with the injury, which required ongoing treatment. On two occasions, he left work early for physical therapy appointments without properly notifying his employer. He was written up for disciplinary warnings on both occasions, but the warnings were never given to him.

On another occasion, Plaintiff sought to leave work early for an appointment, but he was told by management that they did not have time to talk to him. Plaintiff became irritated and made inappropriate comments regarding a manager. He then left work again without first obtaining permission. Plaintiff was subsequently terminated, and the employer cited the fact that he left work without permission and used inappropriate language. He then brought suit for retaliatory discharge.

On appeal to the Alabama Supreme Court, the Plaintiff argued that one of the employer's stated reasons for his termination – leaving work without permission – was pretextual. Therefore, the employer could not establish that Plaintiff was terminated for a legitimate reason. The court agreed.

The employer had argued that the plaintiff was terminated for two reasons: (1) he voluntarily quit by leaving early without permission and (2) he violated company policy by making inappropriate comments to a supervisor. The court found the first reason was pretextual, noting the conflicting testimony in the record regarding the reasons for the plaintiff's termination. Specifically, the court found that the employer did not rely on plaintiff's inappropriate comments in making its initial termination decision. Rather, the evidence supported an inference that the inappropriate comments were only relied upon by the employer "after the fact to bolster its [allegedly] pretextual reason, i.e., that Wood voluntarily quit by leaving work early . . . without permission." Therefore, the evidence supported a verdict in favor of Plaintiff.

This case counsels employers to take caution when terminating employees who have filed workers' compensation claims. Specifically, when an injured employee must be terminated for any reason, the employer should have a comprehensive file containing all the events and circumstances surrounding the termination. Each reason for the termination, as well as all prior instances of discipline, should be documented in writing in the file. Though this documentation can be burdensome to maintain, it may well help successfully defend a retaliatory a discharge claim if one should ever arise.

- Andy Laird

U.S. Supreme Court Holds that Title VII Permits Third-Party Retaliation Claims

In *Thompson v. North American Stainless, LP*, (No. 09-291, Jan. 24, 2011), the United States Supreme Court unanimously held that an employee may bring a Title VII retaliation claim where he or she is subjected to an adverse employment action based on his or her association with another employee who has engaged in protected activity.

This ruling stems from an EEOC charge filed by Miriam Regalado alleging sex discrimination against her employer, North American Stainless ("NAS"). At the time the charge was filed, Regalado was engaged to another NAS employee, Eric Thompson. Three weeks after learning of the EEOC charge, NAS terminated Thompson's employment. Thompson brought a retaliation claim under Title VII, alleging that NAS fired him to retaliate against his fiancée.

On appeal, the Supreme Court noted that the anti-retaliation provisions of Title VII must be construed broadly to encompass any employer action that might dissuade a reasonable worker from making or supporting a charge of discrimination. The Court held that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired." Therefore, Thompson's termination constituted unlawful retaliation even though Thompson himself never complained of discrimination or engaged in any protected activity of his own.

Of important note for employers, the Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful. While it is presently unclear which exact degrees of relationship will be covered by this ruling, the Court did note that firing a close family member will almost always meet the requisite standard, whereas firing a "mere acquaintance" will almost never be sufficient.

This ruling underscores the caution employers should use in taking adverse employment action against a spouse, fiancée, or family member of an employee who has engaged in protected conduct. Employers are well within their rights to take action against an employee when necessary, but attention should be paid to ensuring that such action is based on legitimate non-discriminatory and non-retaliatory reasons and is consistently applied to all similarly situated personnel. Employers may also want to consider adopting policies which prohibit the employment of relatives and spouses and bar romantic relationships between co-employees to further reduce potential retaliation claims.

- Allison Garton

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