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Expert Analysis

Employment Law: an Overview Of Retaliation Claims

Most statutes governing the employment relationship contain a non-retaliation provision prohibiting punishing an employee for engaging in conduct protected under the statute. Retaliation claims are now the most common charge the EEOC receives. This article provides a brief overview of the issues surrounding retaliation claims, with a focus on Title VII (and a brief discussion of New York City law); but the general analysis applies to claims under most statutes.

Retaliation means "to repay (as an injury) in kind; to return like for like; *especially*: to get revenge." http://www.merriam-webster.com/dictionary/retaliation. "[R]etaliation is a form of discrimination." *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 82 (2d Cir. 2015). To state a claim for retaliation under Title VII

By **Jeffrey D. Pollack**

a plaintiff must show (1) participation in a protected activity, (2) defendant's knowledge of the activity, (3) adverse employment action, and (4) causal connection between the protected activity and the adverse action. *Kwan v. The Andalex Group*, 737 F.3d 834, 844 (2d Cir. 2013).

Internal investigations of discrimination or harassment, unless directly related to a pending administrative charge or lawsuit, are covered only by the opposition clause, not the participation clause.

Protected Activity

Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

42 USC 2000-e §3(a) (emphasis added).

Thus, there are two types of protected activity: "opposition," opposing unlawful conduct internally to the organization (e.g., filing a complaint of discrimination with Human Resources or resisting unlawful conduct); and "participation," participating in or initiating an agency (e.g., EEOC) investigation or lawsuit. (Another protected activity is exercising a right under an employment statute, e.g., requesting accommodation of a disability.)

The opposition clause makes it unlawful for an employer to

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> retaliate against an individual because she opposed any practice made unlawful by Title VII, while the participation clause makes it unlawful to retaliate against an individual because she made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. [Notably,] the participation clause only encompasses participation in formal EEOC proceedings; it does not include participation in an internal employer investigation unrelated to a formal EEOC charge.

Littlejohn v. City of New York, 795 F.3d 297, 316 (2d Cir. 2015) (citation and quotation omitted). Thus, internal complaints of discrimination and most internal investigations of discrimination complaints fall only under the opposition clause. *Townsend v. Benjamin Enterprises*, 679 F.3d 41 (2d Cir. 2012).

In *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009), while being interviewed about harassment allegations made by another employee, Crawford told the internal investigator about incidents she experienced personally. The court held her statements were "opposition" even though she herself had not filed a complaint. "[W]hen an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, the communication virtually always constitutes the employee's opposition to the activity." Id. at 276 (citation and quotations omitted). The court also held that *inaction* can constitute opposition, for example "if an employee took a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons." Id. at 277. See also *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2d Cir. 1989) (refusing to destroy memo, in which president directed hiring employee of specific age, was protected activity).

The form of opposition must be reasonable. For example, "opposing" a co-worker's discriminatory comments by slapping him is unprotected. *Cruz v. Coach Stores*, 202 F.3d 560 (2d Cir. 2000). See also *Matima v. Celli*, 228 F.3d 68 (2d Cir. 2000) (yelling and berating behavior rendered complaint unprotected).

Internal investigations of discrimination or harassment, unless directly related to a pending administrative charge or lawsuit, are covered only by the opposition clause, not the participation clause. "Participation" requires that it "be in an investigation or proceeding covered by Title VII, and thus not in an internal employer investigation." *Correa v. Mana Products*, 550 F. Supp. 2d 319, 329 (E.D.N.Y. 2008). If the investigation or proceeding in which the person "participates" is covered by Title VII, the protection from retaliation is "expansive and seemingly contains no limitations." *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003). Defending oneself against an agency charge of discrimination is participation, *Deravin*, 335 F.3d at 203, as is agreeing to testify on someone else's behalf in a Title VII litigation. *Jute v. Hamilton*, 420 F.3d 166, 175 (2d Cir. 2005).

Significant for most readers of this article, suing a company on behalf of a client is not protected activity. *Wigdor v. SoulCycle*, 139 A.D.3d 613 (1st Dept. 2016).

Good Faith Required

"Opposition" requires that the employee have a reasonable, good faith belief that the complained-of conduct happened and constitutes discrimination. (The participation clause does not have such a requirement. *Correa*, 550 F. Supp. 2d at 329.) "[T]he plaintiff need not prove the underlying complaint … had merit, but only that it was motivated by a good faith, reasonable belief that … [it] was unlawful." *Kwan*, 737 F.3d at 843 (citations and quotations omitted).

In *Clark County School District v. Breeden*, 532 U.S. 268 (2001):

> The report … disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making

> love to the Grand Canyon." [R]espondent's supervisor read the comment aloud, looked at respondent and stated, "I don't know what that means." The other employee then said, "Well, I'll tell you later," and both men chuckled. Respondent later complained about the comment … .

Id. at 269. The court held that, "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard." Id. at 271. Thus, the complaint was not protected.

In *Cooper v. New York State Dept. of Labor*, 819 F.3d 678 (2d Cir. 2016), plaintiff, the Director of Equal Opportunity Development, objected to proposed changes in the way internal discrimination complaints would be handled. The court ruled that plaintiff could not reasonably have believed that Title VII covered such a complaint. Id. at 681.

In contrast, in *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013), a graduate student/employee's complaint that a coach played an inappropriate film on a team bus on which she was riding was protected.

> [T]he University's definition of the incident as a "student-on-student" issue has no bearing on the reasonableness of Summa's belief that it was employment related and actionable under Title VII. It is clear … that she [reasonably] believed that the event was employment related … .
>
> As to the assertion that no reasonable person could believe a single incident amounted to a Title VII violation, we disagree. Our case law … establishes that a single incident can create a hostile environment if it is sufficiently severe.

Knowledge of Protected Activity

This point does not require much discussion, but for purposes of a prima facie case a plaintiff may rely on "general corporate knowledge." *Kwan*, 737 F.3d at 844.

Adverse Action

In *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the court held that for conduct to be retaliatory under Title VII it must be "materially adverse"; the "employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 57. The court expressly distinguished materially adverse action from trivial harms. "An employee's decision to report discriminatory behavior cannot immunize that employee from these petty slights or minor annoyances that often take place at work and that all employees experience." Id. at 68.

The most obvious type of adverse action is termination, but it can take many forms. For example, a "change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school aged children." Id. at 79.

The cumulative effect of singularly innocuous actions can be materially adverse.

> Vega alleges that … he was assigned more students with excessive absenteeism records … , his salary was temporarily reduced, he was not notified that the curriculum for one of his classes was changed, and he received a negative performance evaluation … . Some of these actions, considered individually, might not amount to much. Taken together, however, they plausibly paint a mosaic of retaliation … .

Vega v. Hempstead Union Free School Dist., 801 F.3d 72, 91-92 (2d Cir. 2015).

Of particular note for the defense bar, filing a baseless counterclaim against an employee can be retaliation. See generally *Ozawa v. Orsini Design Associates*, No. 13-cv-1282 (JPO), 2015 WL 1055902, *10 (S.D.N.Y. March 11, 2015).

Causal Connection

Lastly, a plaintiff must show that the protected activity caused the adverse action. Employers may discipline employees for conduct unrelated to the protected activity, including wrongful conduct uncovered during a protected

investigation. See *Deravin*, 335 F.3d at 204-05. But, such discipline must be consistent with that imposed on similarly situated persons who did not engage in protected activity.

Often one of the relevant facts is how much time passed between the protected activity and the alleged retaliation. "The cases that accept mere temporal proximity … as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." Clark County School District, 532 U.S. at 273 (citations omitted). Compare *Summa*, 708 F.3d at 128 (4 months close enough to support prima facie case), with *Riddle v. Citigroup*, 640 Fed. Appx. 77, 79 (2d Cir. 2016) (16 months too long a period).

City Law

The retaliation provision in the New York City Human Rights Law (NYCHRL), like all aspects of that law, is broader than under federal or state law.

> The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment … or in a materially adverse change in the terms and conditions of employment … provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.
>
> NYC Admin. Code 8-107(7).

The NYCHRL "expanded the definition of actionable retaliatory conduct to include manifestations of retaliation which might not meet the standards under comparable state and federal laws …" *Brightman v. Prison Health Service*, 108 A.D.3d 739, 740 (2d Dept. 2013). In contrast to the but-for causation standard under Title VII and ADEA (*University of Texas S.W. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2528 (2013) (Title VII); *Gross v. FBL Financial Svcs.*, 557 U.S. 167, 180 (2009) (ADEA)), the complained-of conduct need only be caused "at least in part" by retaliatory motives. *Mihalik v. Credit Agricole Cheuvreux N.A.*, 715 F.3d 102, 113 (2d Cir. 2013).

But even the NYCHRL has its limits. In *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107 (1st Dept. 2012), the court held that allegations that defendant's president "refused to talk with or deal with" plaintiff does not show retaliation. "At most, plaintiff has alleged that his charge of discrimination and subsequent lawsuit caused his personal relationship with Montefiore administrators to deteriorate. [T]his sort of breakdown in personal relationships is inevitable once a serious lawsuit has been commenced." Id. at 131.

In *Chin v. New York City Housing Auth.*, 106 A.D.3d 443 (1st Dept. 2013), the following failed to rise to the level of retaliation: "During a period spanning at least six years, she was variously yelled at, subjected to the occasional offensive remark, required to perform what she regarded as undesirable clerical tasks, and denied family and medical leave, and was overworked and subjected to excessive scrutiny." Id. at 444.

Conclusion

Tread lightly before taking any negative action with respect to employees who recently engaged in protected activity, and, as always, consult with qualified labor counsel *before* acting.