Workplace Retaliation: A Review of Emerging Case Law

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In recent years, retaliation claims with the Equal Employment Opportunity Commission have emerged as the most prevalent discriminatory charge leveled by employees. After several Supreme Court rulings that expanded coverage for employees in retaliation cases (e.g., Kasten v. Saint-Gobain Performance Plastics, *2011;* Thompson v. North American Stainless, *2011), the Court recently reversed course and issued a decision making it more difficult for employees to succeed in retaliation claims (*University of Texas Southwest Medical Center v. Nassar, *2013). So, has the legal tide turned against employees with regard to the issue of workplace retaliation? These cases (and others) have highlighted this emerging legal issue and the potential impact of retaliatory claims for both the employees and management. Due to the saliency of this important workplace issue, this article summarizes key legal decisions with regard to workplace retaliation and the implications for both workers and organizations. In addition, the authors suggest specific recommendations for organizations regarding (a) preventative actions, (b) managerial interventions, and (c) pitfalls to avoid in order to minimize the likelihood of retaliatory behaviors and legal claims.*

Keywords: workplace retaliation, EEO law, Supreme Court, legal issues, retaliatory claims

Over the past two decades, retaliation claims have been on the rise. Indeed, since 2009, retaliation charges have been the most common discrimination suit filed with the Equal Employment Opportunity Commission (EEOC), reaching a high of 37,836 in 2012 (http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm). Many reasons for the increase in retaliation claims have been proposed. They include an actual rise in the frequency of retaliatory behaviors, greater reporting of retaliation, enhanced legal

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protections, faster processing of claims, superior monetary awards, and a wider consideration of what counts as illegal retaliatory behaviors (see Dunleavy, 2007; Malos, 2005; Outtz, 2005). The focus of this article is to summarize relatively recent Supreme Court decisions that have favored employees, which may partly account for the upsurge in retaliation claims. We then describe how a new case by the Court has complicated matters and sets a precedent for making successful retaliation claims by employees more difficult.

Before summarizing these key cases, it is beneficial to summarize the law on workplace retaliation. Retaliation is banned by Section 704 of Title VII of the Civil Rights Act (1964). This prohibition is quite broad. It pertains to all laws and constitutional amendments that relate to civil rights and covers both employees and applicants. Basically, in retaliation cases, plaintiffs must partake in a protected activity by opposing an employment practice (opposition clause) or filing a claim against an organization (participation clause). Next, following their involvement in a protected activity, employees must suffer a so-called material adverse action. Finally, employees must demonstrate that a causal connection exists between engaging in a protected activity and the adverse employment action (Gutman, 2012; Gutman & Dunleavy, 2011; Gutman, Koppes, & Vodanovich, 2010; Hegerich, 2010). In most situations, if plaintiffs meet this burden, organizations must articulate a legal reason for their actions. If this is successful, plaintiffs have an opportunity to prove that the reason(s) offered by the organization is a pretext for illegal retaliation (Donaher, 2009; Gutman et al., 2010).

What follows is an overview of several major retaliation cases that favored employees, followed by the recent Supreme Court decision than may have changed the tide in this area. Finally, recommendations for organizations to confront workplace retaliation are offered.

WHO IS PROTECTED?

One issue in retaliation cases has involved who is covered by the law. For instance, in *Robinson v. Shell Oil* (1997), Robinson was fired by Shell and subsequently filed a race discrimination suit against the company. Later, he applied for another job which required a letter of reference from his previous employer (i.e., Shell). The reference letter was negative and Robinson sued, alleging that Shell had retaliated against him for filing a race discrimination suit. Shell contended that retaliation law only protects *current* employees and applicants, not *former* workers. The lower courts ruled in favor of the company. However, the Supreme Court reversed the lower courts and stated that former employees are protected.

In *Thompson v. North American Stainless* (2011), Miriam Regalado filed a sexual harassment charge. A few weeks after the suit was filed, the company fired Eric Thompson, who was Regalado's fiancée. Thompson filed a retaliation claim with the EEOC. The lower courts ruled in favor of the organization stating that so-called third-party retaliation is not covered under the law (Hegerich, 2010; Sharone, 2010; Twomey, 2011). Once again, the Supreme Court reversed the lower courts and decided that third parties are protected against retaliation. In essence, the Court said that a reasonable worker would be discouraged from filing a suit if they knew that their fiancée would be fired. It is important to note that the Court did not offer specific criteria as how closely connected the third party must be to the claimant, or how severe the retribution toward the third party must be, for a retaliation suit to have merit (Cavico & Mujaba, 2011).

WHAT CONSTITUTES A PROTECTED ACTIVITY?

An important case that helped define "opposition" is *Crawford v. Metro Government of Nashville* (2009). Here, Crawford was interviewed, along with several other employees, by a human resource officer about purported sexual harassment by a supervisor. After providing damaging testimony, she was terminated for alleged embezzlement. Crawford filed a retaliation suit asserting that she was retaliated against for testifying in the sexual harassment investigation. The lower courts ruled in favor of the organization claiming that Crawford did not actively oppose a practice; she had merely answered questions. The Supreme Court ruled in favor of Crawford stating that "nonactive" behavior counts as opposing a practice (Cavico & Mujaba, 2011; Gutman et al., 2010).

In *Kasten v. Saint-Gobain Performance Plastics* (2011), a Fair Labor Standards Act case, the plaintiff alleged that he was fired for *verbally* complaining about a company practice. Specifically, the complaint was that the location of time clocks didn't allow employees to get full credit for time spent changing in and out of their protective gear. The organization's defense was that *oral* complaints were not protected; plaintiffs must formally file a complaint in writing. Once again, the lower courts ruled in favor of the company. But, in this case, the Supreme Court reversed and concluded that Congress intended to protect oral complaints.

WHAT IS A MATERIAL ADVERSE ACTION?

For retaliation claims to be successful, employees must be subjected to a material adverse action. In other words, organizations must do something

fairly substantial to workers—trivial actions are not covered. However, the courts have used different standards to define what constitutes a material adverse action. Some courts have concluded that the company's actions must *result in* a discrete, tangible act against terms, conditions, and privileges of employment (e.g., firing, demotion, denying a promotion). Other courts stated that the acts by companies must *interfere* with terms, conditions, and privileges of employment (Gutman, 2006). A third standard requires that the actions by organizations served to *deter* a reasonable person from engaging in protected activities. In an influential decision by the Supreme Court in *Burlington Northern Santa Fe Railway Company (BNSF) v. White* (2006), the justices ruled that deterring someone from engaging in a protected activity represented a material adverse action. This has been referred to as the EEOC Deterrence standard because it reflected the position of the EEOC. Interestingly, less than 30% of survey respondents indicated that they would fail to file a claim even if they knew negative employment consequences would result from their complaint (Valenti & Burke, 2012, see Table 1).

A fairly immediate result of *BNSF v. White* was that retaliation suits jumped from 22,278 in 2005 to 28,663 in 2007. Contrary to concerns of some justices, early evidence indicated that this case did not yield an initial increase in trivial retaliation cases (see Dunleavy, 2007; Gutman, 2006).

HOW IS A CAUSAL CONNECTION ESTABLISHED?

Plaintiffs must demonstrate that their opposition or participation in a protected activity was the *cause* of the material adverse action that the

Table 1. Summary of Recent Key Retaliation Cases

Case	Major legal point
Robinson v. Shell Oil (1997)	Former employees are protected from retaliation, not just current employees and applicants.
BNSF v. White (2006)	Actions that would deter a reasonable person from engaging in protected activities constitutes a "material adverse action." Supreme Court supported the so-called EEOC Deterrence standard.
Crawford v. Metro Gov't of Nashville (2009)	Participating in an investigation (e.g., as a witness) counts as "opposition."
Thompson v. North American Stainless (2011)	Retaliation against third parties (e.g., fiancées) is protected.
Kasten v. Saint-Gobain Performance Plastics (2011)	Oral complaints are covered, not just formal complaints that are in writing.
University of Texas Southwestern Medical Center v. Nassar (2013)	Plaintiffs must show that an organization's retaliation was the *sole* reason for its adverse employment action.

Note. = Equal Employment Opportunity Commission.

company took against them. This is no easy task. To do so, the alleged retaliatory actions by organizations and the employee's engagement in a protected activity must occur very close together in time. Although there is no specific timeframe to define close temporal proximity, decisions by lower courts have denied causation if the alleged retaliatory action happened 3 or 4 months after employees engage in a protected activity (*Hughes v. Derwinski*, 1992; *Richmond v. Oneok*, 1997) In addition, it is beneficial to mention that companies are not prevented from making legitimate negative personnel decisions because employees have engaged in protected activities. Careful documentation of reasons for such decisions (e.g., poor job performance) can make it difficult for plaintiffs to prove a causal connection between their filing of a claim and a subsequent negative personnel decision (Silvergate & Paskievitch, 2008; Twomey, 2011).

Finally, plaintiffs must also show that organizations had knowledge that they engaged in a protected activity (or that they should have known) in order to show causation (Gutman et al., 2010; Hegerich, 2010; Oderda, 2010). In other words, if evidence is lacking that a company knew an employee filed a lawsuit (or that they should have known about the suit), then a causal connection will not likely be established.

HAS THE TIDE CHANGED?

Given the above, the Supreme Court's decisions in retaliation cases were generally considered to be kind to employees. That is, the Court has taken an expansive view in terms of (a) who was protected, (b) the definition of a protected activity, and (c) the standard to define a material adverse action. However, things were about to change in the case of the *University of Texas Southwestern Medical Center v. Nassar* (2013).

In Nassar, the plaintiff alleged that he was harassed on the job, and that this harassment was racially and religiously motivated. As a consequence, Nassar asserted that he was compelled to quit (a so-called constructive discharge claim). He also claimed that he was retaliated against (not hired) for complaining about being harassed. The Court of Appeals dismissed the constructive discharge claim but ruled in favor of Nassar on his retaliation suit (see Brody & Fagelbaum, 2013). Consequently, the Supreme Court's decision focused on the issue of retaliation.

In a close decision (5–4), the Court concluded that in retaliation cases, for plaintiffs to show causation (the third requirement noted earlier) plaintiffs must prove that retaliation is the *sole* reason for the alleged retaliatory action. This is in sharp contrast to suits filed for alleged discrimination due to race, color, religion, sex, or national origin. That is, given the Civil Rights Act of

1991 (CRA-91), it is illegal to use race, color, religion, sex, or national origin if it simply *motivated* an employment practice.

However, in the *Nassar* case, the Court stated that Congress excluded retaliation from the wording of Section 2000e-2(m) of CRA-91. Consequently, the easier burden of proving that retaliation was a motivating factor for an organization's actions is not sufficient—proof that retaliation was the *only* reason is required. Curiously, age is not mentioned in Section 2000e-2(m) of the CRA-01 either. Therefore, age discrimination under the Age Discrimination in Employment Act (1967) can be actionable only if the plaintiff proves that age was the only reason for the challenged employment practice (see *Gross v. FBL Financial Services,* 2009; Gutman et al., 2010; Vodanovich & Piotrowski, 2011). Another reason for the Court's decision in *Nassar* is that language regarding workplace retaliation in Title VII is located in a separate section (704) than discrimination based on race, color, religion, sex, or national origin (which is in Section 703). In essence, the Court concluded that Congress did not intend to treat retaliation claims in the same manner as discrimination against race, color, religion, sex, or national origin. Therefore, employees must meet a heightened, more stringent burden of proving causation in retaliation cases.

RECOMMENDATIONS

Even though retaliation claims will likely be more difficult for plaintiffs to win, organizations need to be careful to recognize, intervene, and hopefully prevent workplace retaliation. Plaintiffs can still win retaliation cases given the strength and quality of the evidence presented, and such cases can be costly. Below are some suggestions (adopted from Gutman et al., 2010; Silvergate & Paskievitch, 2008), that companies can incorporate to deal with workplace retaliation.

- Develop a solid antiretaliation policy. It's best if this policy includes provisions that discourage coworkers from retaliatory acts, as well as those in supervisory positions.
- Establish an investigative process that involves trained personnel to examine complaints and take proper action based on investigatory data.
- Supervisors need to be cognizant of what constitutes a retaliatory behavior as defined under law, including issuing poor performance appraisals, providing negative job references, and retaliating against third parties of claimants.
- Document the reasons for all personnel decisions a priori (e.g., terminations, job transfers) especially regarding decisions which occur in close

temporal proximity for those who have opposed or participated in protected activities. It is also recommended to keep records of employee complaints and all organizational responses to these complaints.

- Avoid including employee complaints in personnel files and endure confidentiality of complaints.
- Establish an organizational climate that encourages civility and condemns retaliatory actions. It is best if such a climate is reinforced with information contained within job announcements, realistic job previews, and orientation efforts.
- Take immediate corrective action to end any retaliatory behaviors.
- Regularly assess the efficacy of retaliation programs (e.g., training, grievance process, policy statements) and make adjustments if needed.

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