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WHEN THE PLAINTIFF IS ALSO YOUR EMPLOYEE

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Introduction.

Over the last decade, retaliation claims have skyrocketed. According to the Equal Employment Opportunity Commission (EEOC), retaliation charges comprised 27.1% of its case load in 2000 as compared to 15.3% in 1992. Charges alleging violations of Title VII's anti-retaliation provision have grown from 10,499 charges filed in 1992 to 19,753 filed in 2000.[1]

Accompanying this surge in retaliation claims is the trend in recent years for employees to file charges, internal complaints, and even lawsuits while they remain employed their employer -- the very target of their discriminatory accusations.

Dealing with an employee who has become an adversary poses significant challenges for an employer. On the one hand, these employees need to be treated just as any other employee. At the same time, however, employers need to be mindful of the fact that employees who have asserted some type of complaint regarding discriminatory or illegal treatment do enjoy protected status. As a result, it is often a difficult tightrope to walk for those employers who seek to effectively manage these employees without inadvertently subjecting themselves to claims of retaliation.

II. Understanding the Legal Framework of Retaliation Claims.

The majority of federal legislation prohibiting discrimination in the workplace contains some type of anti-retaliation provision.[2] Courts have generally agreed on the elements necessary for an individual to prove retaliation, and the Title VII standard has usually served as the prototype.

Under Title VII, an individual who asserts a claim of retaliation is first required to establish what is known as a "*prima facie*" case, consisting of the following elements:

1. The employee engaged in protected activity;

2. The employee was subjected to an adverse employment action; and

3. A causal link exists between the employee's protected activity and the adverse employment action.[3]

Once an individual has set forth a *prima facie* case of retaliation, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. After the employer has done so, the burden of proof then shifts back to the individual to show that the employer's stated reason is a pretext for retaliation.[4]

A. Determining whether protected activity has occurred.

Title VII's anti-retaliation provision sets forth two distinct types of activities which are deemed protected. The first type of employee conduct deals with "opposition" -- that is, the employee has made some informal complaint regarding what he or she perceives as unlawful conduct. The second type of conduct involves an employee's "participation" -- meaning that the employee has been involved in some type of formal proceeding such as filing a charge with a state or federal agency, commencing a lawsuit, or testifying or providing information in a formal proceeding which involves another person.[5]

For an employee's "opposition" conduct to be protected, the courts have required that the employee have an "objectively reasonable" and "good faith" belief that the complained-of conduct violated the law.[6] It should be noted, however, that this standard does not factor into an employee's participation conduct -- the mere filing of a charge or lawsuit, for example, is sufficient to be protected, regardless of its underlying merit.

B. Adverse Employment Action: How Bad Does it Need to Be?

The second factor in a retaliation case is the measure of the employer's conduct toward its employee in order to evaluate whether actionable retaliation has been established. Unfortunately, the courts are divided on this particular issue, and the Ninth Circuit Court of Appeals -- which governs

[1] EEOC Charge Statistics FY 1992 through FY 2000 (January 18, 2001). See www.eeoc.gov/stats/charges.html.

[2] A compendium of these statutes appears at Appendix A to this section.

[3] *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

[4] *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

[5] 42 U.S.C. § 2000e-3(a).

[6] *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 n.5 (9th Cir. 1978); *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062 (1998).

Nevada employers -- has carved out an interpretation not shared by any other court which poses the most difficulty for employers.

The majority of the federal courts have embraced one of the following definitions of an adverse employment action:

> **Ultimate Employment Action** -- The most employer-friendly interpretation, restricted to decisions such as hiring, granting leave, terminating, promoting and compensating.[7]
>
> **Materially Adverse Change** -- A somewhat broader definition, encompassing decisions which alter an employee's compensation, terms, conditions, or privileges of employment, or otherwise adversely affect the employee's status.[8]
>
> And then there's the Ninth Circuit's definition:
>
> **Reasonably Likely to Deter Employees From Engaging in Protected Activity** -- Abandoning any threshold requirement for the decision, and instead holding that *any* employer action can be adverse.[9]

As might be expected because of these divergent standards, the courts have reached very different results when considering whether a particular complained-of employer action rises to the level of an adverse employment action.

For example, other courts have held that the following actions are not sufficiently adverse:

- Threats to fire employee[10]
- Missed pay increase[11]
- Reassignment of employee[12]
- Oral reprimands[13]
- Supervisor's yelling at employee and generally refusing to communicate with her[14]
- Moving employee's desk[15]
- Monitoring telephone calls[16]

By contrast, the Ninth Circuit has recognized adverse employment actions in the following:

- Transfers[17]
- Negative performance reviews[18]
- Reduction of job responsibilities[19]
- Negative job references, regardless of impact[20]
- Assignment of different/more difficult duties[21]

C. Establishing the Causal Link.

The third and final element of the *prima facie* case -- that of a cause and effect relationship between the exercise of protected activity by an employee and some adverse employment action -- is by far the most important in making the inquiry as to whether retaliation has occurred. In the absence of some connection, there is no showing of retaliation.

In attempting to make this connection, employees often focus on the timing of events (also known as temporal proximity) -- hoping to demonstrate that an adverse employment action that follows closely on the heels of some protected activity is conclusive proof of an employer's retaliatory motive.

As a general matter, timing is critical in situations involving retaliation claims. While closeness in time has not been held to be dispositive in proving whether retaliation has occurred, the fact remains that the close proximity of events is often a very persuasive factor.[22] Employers should therefore be wary that retaliation claims encompassing a very short time line will likely not be ripe for summary judgment and will have to proceed to trial.

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[7] This is the view shared by the Fifth and Eighth Circuits. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

[8] Adopted by the First, Second, Third, Fourth, Sixth, Seventh, Tenth and Eleventh Circuits. See *White v. New Hampshire Dept. of Corrections*, 221 F.3d 254, 262 (1st Cir. 2000); *Richardson v. New York State Dept. of Corrections*, 180 F.3d 426, 446 (2d Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Munday v. Waste Management*, 126 F.3d 239, 243 (4th Cir. 1997); *Yates v. AVCO*, 819 F.2d 630, 638 (6th Cir. 1987); *Cullom v. Brown*, 209 F.3d 1035, 1041 (7th Cir. 2000); *Heno Sprint/United Management Co.*, 208 F.3d 847, 857-58 (10th Cir. 2000); *Gupta v. Florida Board of Regents*, 212 F.3d 571, 588 (11th Cir. 2000).

[9] *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

[10] *Mattern*, 104 F.3d at 708.

[11] *Id.*

[12] *Ledergerber*, 122 F.3d at 1144.

[13] *Robinson*, 120 F.3d at 1300-02.

[14] *Munday*, 126 F.3d at 243.

[15] *Heno*, 208 F.3d at 857.

[16] *Id.*

[17] *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

[18] *Id.*

[19] *Kortan v. California Youth Authority*, 217 F.3d 1104, 1113 (9th Cir. 2000).

[20] *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997).

[21] *Kortan*, 217 F.3d at 1113.

[22] *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2001) and *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001) (both stating that retaliation claims cannot be based solely on temporal proximity); *but see Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) ("causation may be established based on the timing of the relevant actions.").

III. *Clark County School District v. Breeden*:[23] The Supreme Court Gives a Boost To Employers.

On April 23, 2001, the United States Supreme Court entered into the minefield created by the Ninth Circuit relative to workplace retaliation claims. Specifically, the Supreme Court reversed a decision of the Ninth Circuit which had resurrected Shirley Breeden's Title VII sexual harassment and retaliation claims against her employer, the Clark County School District. Breeden's lawsuit involved a single verbal comment which she contended was sexual harassment, and a lateral transfer which she contended was retaliatory after she complained internally about the alleged harassment. Throughout her lawsuit, Breeden remained employed by the District.

Breeden's job within the District's Human Resources division required her to review employment application materials for school police officer applicants. In one applicant's file, she read a comment which he had reportedly made to another employee at a previous job. The comment was, "I hear making love to you is like making love to the Grand Canyon." Breeden was not offended when she read this remark. Later, however, in a 1994 meeting between Breeden, her male supervisor, and another male employee to discuss applicants, the supervisor read the above comment and then stated he did not know what it meant. The other employee stated, "Well, I'll tell you later," and both men chuckled. Breeden claimed she was harassed by this meeting behavior, and she made an internal complaint.

Breeden was later transferred to another department in 1997, approximately 10 days after she filed her lawsuit. She claimed that such transfer was retaliatory.

At the trial court level, summary judgment was awarded to the District. Breeden appealed to the Ninth Circuit, but only as to her retaliation claim. Given the Ninth Circuit's expansive view of adverse employment actions, it reinstated Breeden's lawsuit, finding that her belief that the single comment was sexual harassment may have been reasonable and that the transfer may have been an adverse employment action.

The District sought review of the Ninth Circuit's decision from the United States Supreme Court. In a highly unusual move, the Supreme Court not only accepted the case for review, but also unanimously reversed the Ninth Circuit, thereby finally disposing of Breeden's case.

In analyzing the retaliation allegation made by Breeden, the Supreme Court first noted that "[n]o reasonable person could have believed that the single incident [between Breeden and her supervisor during the meeting] . . . violated Title VII's standard," especially in light of Breeden's job duties and her admission that reading the remark in the candidate's application packet before the meeting did not disturb her.[24]

Second, the Court addressed whether Breeden's transfer was caused by her discrimination charge and lawsuit. Because the District had earlier discussed with Breeden's union its intention to transfer Breeden to another department shortly before Breeden filed suit, the Supreme Court found that the District's decision to carry through with the transfer after receiving notice of the lawsuit did not demonstrate causation. Significantly, the Court held that:

> Employers need not suspend previously planned transfers upon discovery that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.[25]

Besides its guidance as to whether a minor incident can precipitate an actionable sexual harassment claim, the *Breeden* case serves as an important beacon to employers in their efforts to effectively manage employees who file complaints of discriminatory or illegal treatment. By holding that the implementation of Breeden's transfer, at a time when she was involved in the legal process against her employer, was not causally linked to her complaints, the Supreme Court validated employer efforts to run their businesses and make employment-related decisions without fearing that such decisions need to be shelved once an employee files a complaint.

Employers who feel that entire courses of action involving their employees will be preempted or otherwise derailed after an employee engages in some form of protected activity can take comfort in the *Breeden* Court's ruling. Of course, it should be remembered that the facts involved in *Breeden* were particularly helpful because there was evidence showing that the transfer decision had been earlier contemplated and discussed. In the absence of such evidence, the result could have been much different.

IV. The Growing Popularity of Worker's Compensation Retaliation Claims.

In addition to concerns about retaliation claims asserted under Title VII and other federal employment statutes, employers must also remain vigilant in order to avoid common law claims of retaliation. These types of claims are usually asserted under state law, and allege that some form of adverse action has been taken against the employee "in violation of

[23] 121 S.Ct. 1508 (2001).

[24] *Id.* at 1510.

[25] *Id.* at 1511.

public policy." Claims of this sort are extremely difficult to dispose of summarily, and consequently employers are compelled to present their case before a jury.

One particularly dangerous trend that has emerged is the flurry of claims which now assert retaliation in response to an employee's filing of a worker's compensation claim. The Nevada Supreme Court first addressed this issue in the 1984 case of *Hansen v. Harrah's*.[26] In *Hansen*, the plaintiffs alleged retaliatory discharge in response to their filing claims under worker's compensation. The Nevada Supreme Court, in rejecting the employers' "at-will employment" defense, stated:

> Nevada's workmen's compensation laws reflect a clear public policy favoring economic security for employees injured in the course of their employment. It has been a long-standing policy of this Court to liberally construe such laws to protect injured workers and their families....[27]
>
> We elect to support the established public policy of this state concerning injured workmen and adopt the narrow exception to the at-will employment rule recognizing that *retaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort*.[28]

Although employees have continued to assert retaliation claims based upon their filing of worker's compensation claims since the *Hansen* decision, widespread interest in these claims did not really peak until the Nevada Supreme Court's decision in *Dillard Department Stores, Inc. v. Beckwith*.[29]

The *Beckwith* case involved a long-term management-level employee, Deloris Beckwith, who injured herself at work and then filed a worker's compensation claim. When the employer asked her to return to work even before she was medically released to do so, Beckwith declined, on her doctor's advice. The employer then filled her managerial position with another individual. When Beckwith later returned to work, she was demoted to an entry-level position which resulted in a 40% reduction in her compensation and benefits. Beckwith's situation became a hot topic of gossip among her coworkers, and she experienced humiliation. Although there were two managerial jobs open for which Beckwith was qualified, she was nonetheless demoted because she took time "off for workman's [sic] comp."[30] Beckwith then began treatment for depression, and later resigned her employment. Beckwith sued, claiming retaliatory constructive discharge and intentional infliction of emotional distress.

At trial, the jury awarded Beckwith $424,028.00 on her retaliation claim and $200,000.00 on her emotional distress claim. The jury also awarded punitive damages in the amount of $1,872,084.00. The court then awarded Beckwith her attorney's fees in the amount of $518,455.00.

On appeal by the employer, the Nevada Supreme Court upheld both the jury's verdict on damages as well as the court's attorney's fees award. News of the $3 million decision spread rapidly through the local legal community and plaintiffs' lawyers began viewing worker's compensation retaliation claims with renewed interest.

Though the *Beckwith* case was decided only 18 months ago, Kamer Zucker & Abbott has since seen an increased amount of litigation asserting retaliation based upon the filing of worker's compensation claims. The *Beckwith* case serves as an important wake-up call for Nevada employers inasmuch as it provides insight as to how a local jury is likely to view the value of these claims. While the particular facts at issue in *Beckwith* are unique, it nevertheless stands to reason that similar situations will face equivalent scorn by a jury.

V. Strategies for Dealing with Adversarial Employees.

In those circumstances where an employee has engaged in protected activity and still continues to work for the employer, extreme care must be taken to ensure that the employer does not set itself up as a target for a potential retaliation claim. Employees have increased awareness of their legal rights, and many believe that once they take some action, whether it involves making a sexual harassment complaint or filing a worker's compensation claim, they become "bulletproof" -- in other words, insulated against any type of adverse decision-making.

The Ninth Circuit has acknowledged the special problems an employer faces when an employee engages in protected activity and then continues to work for the same employer. As the Court aptly recognized:

> We worry that employers will be paralyzed into inaction once an employee has lodged a complaint under Title VII, making such complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct.[31]

[26] 100 Nev. 60, 675 P.2d 394 (1984).

[27] *Id.* at 63.

[28] *Id.* at 64 [emphasis added].

[29] 989 P.2d 882 (2000).

[30] *Id.* at 884.

[31] *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

Notwithstanding the fact that employees who complain do enjoy protected status, they are by no means impervious to employer decisions such as discipline and discharge. The key to successfully managing and supervising an adversarial employee, however, is to engage in a thoughtful and complete analysis of a particular situation *before* any action is taken.

Few employees who accuse their employers of discriminatory or other illegal conduct are able to conceal their acrimony. In the work environment, such animosity can take several forms. Often, the employee will feel the need to "bait" the employer, claiming that every minor problem that arises is due to retaliation. In other circumstances, the employee may provoke hostile confrontations with supervisors and coworkers. The employee may also engage in substandard work or misconduct.

Employers need not sit idly by and endure employee behavior which is disruptive, unsatisfactory or willful. Rather, employees who engage in such conduct need to be sent a message that this type of behavior is inconsistent with the employer's expectations and will not be tolerated. When employees have previously complained or otherwise undertaken protected activity, however, the employer must be careful to avoid a "knee-jerk" response which may give the appearance of a retaliatory motive. The better course in these instances is to evaluate the employee's conduct and treat him or her in a manner consistent with how other employees have been treated.

The following tips are offered to effectively manage an adversarial employee while minimizing the prospect of retaliation claims:

- ☐ Maintain policies which encourage employees to report problems and concerns.
- ☐ Provide complaint-reporting mechanisms which allow an employee to bypass the supervisor (or other potential perpetrator of the complained-of conduct).
- ☐ Develop a written policy prohibiting any type of retaliation in response to an employee's exercise of protected conduct.
- ☐ Train managers and supervisors as to their responsibilities in receiving and handling employee complaints, recognizing problems and asking for help.
- ☐ Investigate all complaints received from employees, no matter how inconsequential the allegations appear.
- ☐ Document the investigation conducted and the conclusions reached.
- ☐ Communicate the results of the investigation to the complainant.
- ☐ Encourage the complainant to report any instances of alleged retaliation.
- ☐ Remind others of the company's prohibitions against retaliatory conduct.
- ☐ Establish a partnership between Human Resources or upper management and the complainant's supervisor, directing the supervisor to review with others any proposed personnel actions affecting the complainant before they are carried out.
- ☐ Resist the temptation to discipline or discharge for minor infractions.
- ☐ Enforce disciplinary and discharge penalties consistently for all employees.
- ☐ Continue to document the complainant's work performance and note any deficiencies, if applicable.

VI. Conclusion.

Employees who become adversaries by filing complaints or claims against their employers require special handling. Though these employees occupy protected status against retaliation, it does not follow that an employer is required to abdicate its management rights. The guiding principle to follow is that an employee who engages in protected activity should be in no better or worse position than his or her coworkers.

Because adversarial employees who continue working often allow their disputes to permeate the work environment, employers must strive to enforce reasonable work rules consistently and uniformly. An employer's objective in maintaining order, productivity and morale should be tempered with the recognition that almost any type of action which affects the adversarial employee will be viewed negatively and will likely serve as fodder for a retaliation complaint.

Where an employee has complained about something, extreme care must be taken in managing that employee. For example, personnel decisions should not be left solely to the supervisor's discretion, particularly in those circumstances where the supervisor was the focus of the employee's complaint. Instead, all potentially adverse decisions should be cleared through upper management or Human Resources.

In addition, before any action is taken the employer should review how it has handled similar instances involving other employees. If discipline has been lacking or otherwise spotty, it would be unwise to blaze new trails with an already adversarial employee -- given the virtual certainty that the decision will prompt a claim of retaliation.

MAJOR FEDERAL STATUTES CONTAINING ANTI-RETALIATION PROVISIONS

STATUTE	ENFORCING AGENCY	PROTECTIONS	ENFORCEMENT PROCEDURES AND REMEDIES
Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* Section 623(d) contains the anti-retaliation provision	Equal Employment Opportunity Commission (EEOC)	Retaliation prohibited for opposing unlawful practice, testifying, participating or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by EEOC or by employee in U.S. District Court. Damages include reinstatement, backpay, liquidated damages for willful violations and attorneys' fees.
Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* Section 12203 contains the anti-retaliation provision.	Equal Employment Opportunity Commission (EEOC)	Retaliation prohibited for opposing unlawful practices, testifying, participating or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by EEOC or by employee in U.S. District Court. Damages include reinstatement, backpay, liquidated damages for willful violations and attorneys' fees.
Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001 *et seq.* Section 1140 contains the anti-retaliation provision.	None	Retaliation prohibited for giving information or testifying in any inquiry or proceeding.	Civil action in U.S. District Court for reinstatement, backpay and attorneys' fees.
Equal Employment Opportunity Act, (Title VII), 42 U.S.C. §§2000e *et seq.* Section 2000e-3(a) contains the anti-retaliation provision.	Equal Employment Opportunity Commission (EEOC)	Retaliation prohibited for "opposing" unlawful practice or testifying, participating or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by EEOC or by employee in U.S. District Court. Damages include compelled hiring, reinstatement, backpay and attorneys' fees.
Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(3).	U.S. District Court or State Court	Retaliation prohibited for filing complaint, testifying in proceedings or serving on industry committee.	Civil action in state or Federal court for reinstatement, backpay, an equal amount of liquidated damages and attorneys' fees.
Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601 *et seq.* Section 2615 contains the anti-retaliation provision.	Department of Labor (DOL)	Retaliation prohibited for opposing unlawful practices or filing a complaint, testifying, participating or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by the DOL or by employee in U.S. District Court.
National Labor Relations Act of 1935 (NLRA) as amended by the Labor Management Relation Act of 1947 (LMRA) 29 U.S.C. §141 *et seq.* Section 158 contains the anti-retaliation provision.	National Labor Relations Board (NLRB)	Retaliation prohibited for engaging in concerted activity.	Administrative investigation action may be brought by agency on employee's behalf. Damages include reinstatement and backpay.
Occupational Safety & Health Act, 28 U.S.C. §651 *et seq.* Section 660(c) contains the anti-retaliation provision.	Occupational Safety & Health Administration (OSHA)	Retaliation prohibited for filing complaint, testifying in enforcement proceedings or exercise of any other rights under OSHA (includes limited right to refuse work).	Administrative investigation action may be brought by agency on employee's behalf in U.S. District Court. Damages include reinstatement and backpay.

* This appendix was modeled after a similar appendix in Daniel P. Westman, *Whistleblowing: The Law of Retaliatory Discharge 188-197 (BNA 1991).*