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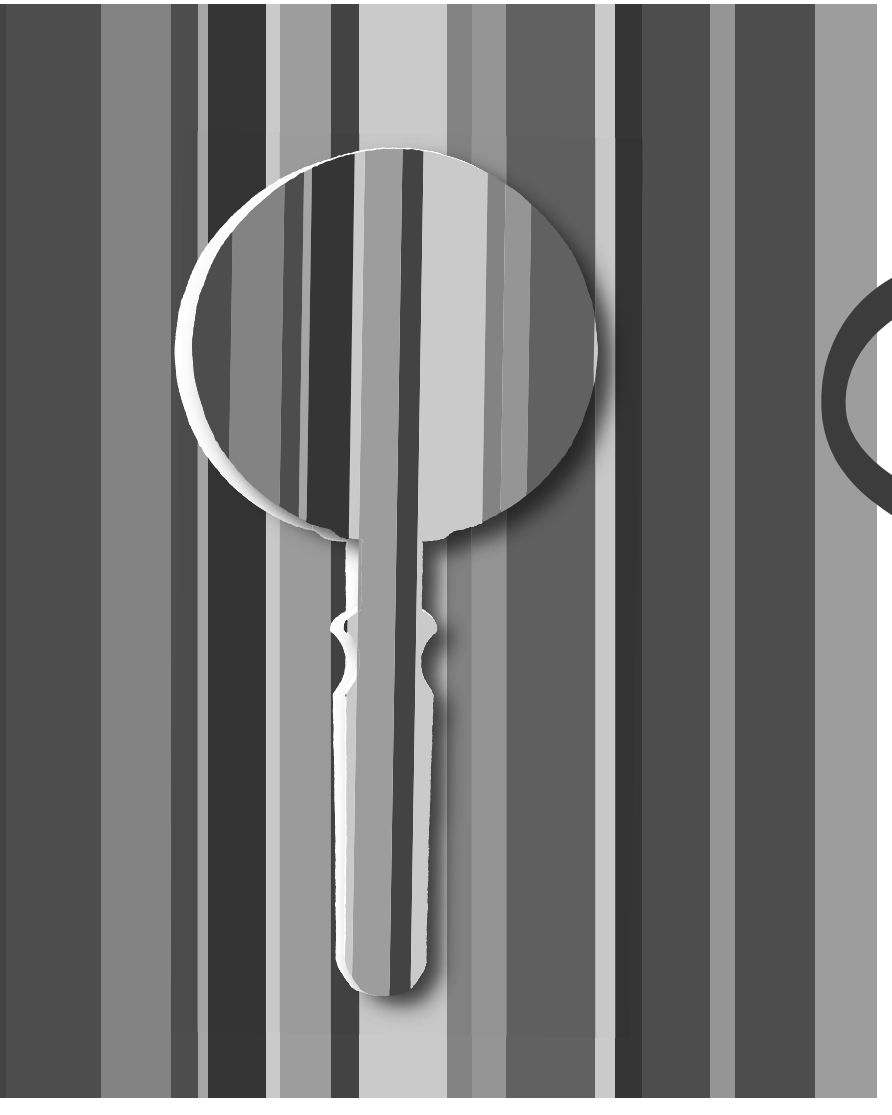
C-TITLE INSIGHTS FOR BUSINESS LEADERS



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The Manager's Simple Guide to Avoiding Retaliation

By Margaret Hart Edwards

On June 22, 2006 the U.S. Supreme Court decided Burlington Northern and Santa Fe Railway Company v. White, a case involving Ms. White's claims of retaliation.

The Court's definition significantly expanded liability for employers in many jurisdictions. Until this decision, some courts allowed claims of retaliation under Title VII of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, sex, national origin, etc.) only where the adverse action was taken in the context of "ultimate" employment actions, such as refusal to hire, discharge or demotion.

Other courts took a more expansive view that the retaliatory action could relate to any adverse employment action that altered the terms or conditions of employment. A few courts took the most expansive view – the one promoted by the EEOC – that any action could be retaliation if it was reasonably likely to deter the charging party from making or participating in a claim of discrimination. The action would not even have to be work-related.

In White, the U.S. Supreme Court adopted this most expansive view, expressly deciding that the retaliatory action need not be work-related and could be any action that would deter a reasonable person, in the circumstances, from engaging in protected protests, charges, or participation in actions under Title VII.

Given the greatly expanded reach of the retaliation provisions of Title VII and the influence this new decision is likely to have on the theory of retaliation cases generally, the Supreme Court's opinion may be expected to lead to an increase in retaliation claims. These claims are already common, and they pose a particular danger to employers. Juries may determine that no discrimination occurred, but still find that there was retaliation against the employee who complained about discrimination. This article is a simple guide for managers to understand what is and is not illegal retaliation.

WHAT LAW PROHIBITS RETALIATION?

Retaliation claims may be based on specific state or federal statutes that prohibit retaliation, or on state common law doctrines that prohibit retaliation for exercising a legal right, refusing to engage in illegal conduct, or whistleblowing.

More than 30 federal statutes prohibit retaliation against per-

sons who engage in "protected activity." That might include reporting violations of environmental laws or health and safety regulations; reporting or assisting in investigations or proceedings relating to securities laws violations; reporting waste or mismanagement of government funds; complaining or taking concerted action regarding wages, hours and working conditions; taking a protected leave of absence; or opposing any unlawful employment discrimination, or making a charge, testifying, assisting or participating in any investigation, hearing or proceeding under employment discrimination laws.

Most states also have specific prohibitions against retaliation for refusing to work in unsafe conditions, making a workers' compensation claim, asserting claims for wages owed, whistleblowing about illegal activity, and protesting illegal discrimination.

State common law claims may be made, as well. This effectively extends the reach of statutes, by making certain terminations of employment or even "wrongful discipline" illegal retaliation.

Thus, under the common law in many states, an employee may sue for wrongful discharge if he or she is fired for refusing to engage in an illegal act, for pursuing a protected right (such as serving on a jury or hiring a lawyer to get advice about legal troubles with his or her employer), or simply for making an internal report to the employer regarding illegal activity going on at work.

Under anti-discrimination laws, and many other statutes as well, protections against retaliation generally cover applicants for employment and former employees, as well as current employees. Otherwise, the philosophy behind the anti-retaliation rules – to prevent harm to persons based on their protected conduct – would not be served.

HOW DOES THE MANAGER RECOGNIZE PROTECTED ACTIVITY?

Protected activity isn't always obvious. For example, the Eleventh Circuit Court of Appeals held that an employee who admitted in a deposition, required by a plaintiff, that he had sexually harassed another employee, was "participating" in a protected activity even though his deposition was involuntary. Firing him for testifying (as opposed to firing him for engaging in harassment) was unlawful.

However, participating in a discrimination investigation on an employer's side (rather than the employee's side) is not protected participation in proceedings, according to the Seventh Circuit. The courts are split on whether an employee who lies during an internal investigation is protected as "participating" in proceedings involving a claim of discrimination.

Juries may determine that no discrimination occurred, but still find that there was retaliation against the employee who complained about discrimination.

Protected activity must be made known to management, either under the standard of actual or constructive knowledge. For example, the California Supreme Court recently ruled that a regional sales manager for L'Oreal engaged in protected activity by refusing to carry out the order of her male supervisor to terminate a female sales associate who was not "hot" looking. The sales manager never told her boss that she thought his order was illegal, but did repeatedly ask for a justification for the order to terminate.

In those circumstances, the court said, the employer could reasonably be expected to know that the employee was refusing to obey an order because she believed it to be discriminatory.

Simply asking an employer if race played a part in a decision can be enough to constitute protected opposition to discrimination, according to the Fourth Circuit Court of Appeals.

The courts have generally said that internal complaints about company policies, the boss, bad hiring decisions, and poor management are not protected activity unless they are tied to a claimed violation of a statute.

Depending on the legal source relied on for the retaliation claim, the party claiming protection for whistleblowing may not have to actually blow the whistle by going to a government agency. A threat to do so or an internal report of wrongdoing may be enough.

WHAT ARE EXAMPLES OF PROHIBITED RETALIATION?

Illegal retaliation has been found in a wide variety of cases. Here are some examples.

- Refusing to hire an employee because he sued his previous employer for discrimination.

- Refusing to hire an employee because he made a workers' compensation claim against a previous employer.

- Refusing to hire an employee

because he made a request for reasonable accommodations for a disability.

• Changing job assignments to an employee because he complained about illegal discrimination.

• Removing an employee from his office and giving him less attractive work space because he took a legally protected leave of absence.

• Delaying or denying a promotion to an employee because he refused to terminate a worker who was unattractive.

• Giving an unwarranted negative performance review to an employee because he complained about harassment.

• Giving a smaller raise to an employee who complained about improper accounting practices in a publicly traded company.

• Allowing co-workers and supervisors to insult, bait, and ostracize an employee, thereby creating a hostile work environment, because she complained about a popular manager.

• Soliciting criticism (from other employees) of an employee who complained about safety violations.

• Excluding a person from meetings because he claimed certain sales practices were illegal.

• Denying administrative support to an employee who complained about unfair pay practices.

• Disciplining an employee for a minor infraction because the employee made an earlier accusation of illegal harassment.

• Suspending an employee without pay during an investigation of alleged insubordination (even though the suspension is later lifted and pay restored) because he complained about discrimination.

• Changing the flex-time schedule of an employee with a disabled child because she complained about illegal practices.

• Excluding an employee from training opportunities because she was a witness against the employer in a claim of discrimination.

• Engaging in a campaign involving rudeness, exclusionary behavior, criticism, joking, and actions to embarrass and humiliate the employee into quitting, because the employee reported illegal conduct.

• Terminating a sales representative for refusing to participate in price fixing.

• Terminating a manager for refusing to "Americanize" a workforce that was predominately Japanese.

• Terminating a worker for refusing to violate state liquor laws by rearranging products at retail outlets.

• Terminating an employee for complaining to management that the employer was not paying overtime as required by law.

• Terminating an employee for reporting a government contractor's improper billing practices to the government.

• Terminating an employee for reporting a personnel agency's referral practices that discriminated against minorities.

• Terminating an employee because he filed safety complaints against his prior employer.

• Terminating an employee for reporting illegal hiring of undocumented workers to the INS.

• Giving a negative reference to former employees because they sued the employer for discrimination.

• Filing false criminal charges against a former employee who complained about discrimination.

SOME KEY QUESTIONS

• **Can a manager be personally liable?** The answer is, yes, in some circumstances. Some state anti-discrimination statutes allow it – California's for example. The Americans with Disabilities Act imposes personal liability on managers for retaliation, whereas Title VII of the 1964 Civil Rights Act does not.

Persons not actually working for the employer – recruiters, customers, and vendors, for example – can also have personal liability if they are found to be aiding and abetting unlawful discrimination. The term "discrimination" is used in Title VII not only to refer to illegal discrimination in employment, but in a broader sense to retaliation as well.

• **Is the employer responsible for retaliation by employees even when the retaliation violates the employer's policies?** The federal courts have not taken uniform positions on whether the employer is strictly liable for retaliatory acts by employees. Rules that have evolved in harassment cases may be the best guide, by analogy. If the retaliator is a member of management, the employer is more likely to be held strictly liable because the employer placed the retaliator in a position of power. Where the retaliator is not a member of management, liability may depend on whether the employer knew or

should have known of the retaliatory behavior and did nothing to prevent it or stop it.

•Must the employee's protected activity be the only reason for the adverse action? Most statutes prohibit adverse action taken "because of" the employee's protected activity. Some courts interpret this to mean that retaliation was the sole reason. Others require retaliation to be the motivating reason for the action taken. To win, the employee must prove a prima facie case. In other words, the employee must prove that (1) he engaged in protected activity by complaining, protesting, opposing, participating, etc., (2) that adverse action was taken against him after that, and (3) that the facts indicate a causal relationship between the two events.

The causal relationship often can be shown by proving that the employee was meeting the employer's legitimate expectations, the employer knew about the employee's protected activity, that the adverse action closely followed the protected activity, and that a similarly situated person who did not engage in protected activity was not treated adversely.

To counter the employee's proof, the employer must provide a good faith business explanation for the adverse action. To win, the employee must then prove that reason to be a pretext for retaliation. To prove pretext, the employee uses evidence such as timing, comparison to other workers, and remarks by managers showing intent to retaliate. When a manager tells an employee who has complained that his complaint is the reason for adverse action, this is direct evidence of retaliation.

Under Sarbanes-Oxley, the employee need prove only that the protected activity was a contributing factor in the adverse action against him. Once the employee proves that, the employer then has the difficult burden of proving by clear and convincing evidence that it would have taken the same action toward the employee regardless of the employee's protected activity.

•What role does timing play in retaliation cases? Timing is often one of the strongest elements of

TEN WAYS TO AVOID RETALIATION CLAIMS

1 Engage in systematic, detailed, and accurate documentation of performance problems, so that it does not appear that documentation starts only after an employee complains.

2 Avoid any expression of hurt, anger, or resentment about an employee's complaint. Almost any statement by a manager can be used against the manager as evidence of retaliatory motive. Email is particularly devastating proof of retaliation.

3 Be alert to potential protected activity, as it can assume a variety of forms.

4 Take all complaints of illegal harassment, discrimination, or illegal activity seriously, and make sure they are investigated thoroughly by someone independent and competent to perform the investigation.

5 Make sure that managers and supervisors are well trained on the duty to avoid retaliation.

6 Take all claims of retaliation seriously. Investigate all potential cases of retaliation rigorously, paying very careful attention to the chronology of events, and questions of "action-reaction." Address retaliatory behavior decisively and seriously. Retaliation claims are particularly likely to give rise to a large jury award of punitive damages.

7 Before taking adverse action against an employee who has engaged in protected activity, consider how the action might appear to the employee and disinterested observers. Is the action consistent with how the employer has acted towards employees who have not engaged in protected activity?

8 Do not use the next layoff as a way to get rid of a complaining employee, unless the business case for laying him off is likely to be an easy sell to 12 jurors.

9 Make sure that the company has good anti-retaliation policies, and that they are not buried at the end of company policies on other subjects.

10 Always remember that whistleblowers, no matter how disliked by their employers, may be perceived as heroes by the public.

circumstantial evidence for retaliation. Timing may become germane in several ways. Where the adverse action closely follows the protected activity, timing is used to argue a cause and effect relationship between the two. There is a maxim: *post hoc ergo propter hoc.* (It happened later, so it happened because).

Of course, the more time that passes between the protected activity and the claimed retaliation, the less likely is a causal relation between the two. How much time before the causal chain is weakened or broken is a source of much indefinite jurisprudence. Seven months may break the chain of causation, whereas one month does not. In between these two poles, case results vary.

Timing is one piece of evidence. As a factual element, it must be added to others. There is no bright line, and in some circumstances the facts may demonstrate that a manager has practiced another adage: "Revenge is a dish best served cold."

Another way that timing is used is to contrast a history of good performance over a period of years, with a pattern, after the employee engages in protected activity, of constant criticism. The contrast can be evidence of retaliation.

Of course, timing may work for the employer too. The employee who complains of harassment only after hearing that he is about to be laid off, or after receiving a negative performance review, may be making a retaliatory complaint of discrimination. This is circumstantial evidence of the employee's bad faith, but not enough to relieve the employer from its duty to investigate the claim of harassment.

• Must a manager keep treating the person who complains exactly the same? Most managers are not capable of "divine forgiveness" and find it very difficult not to be at least somewhat guarded around an employee who has complained. The real question is whether the behavior is likely to be perceived as serious enough to deter a reasonable employee, in the circumstances, from engaging in protected activity.

To counter the employee's proof, the employer must provide a good faith business explanation for the adverse action.

This standard is meant to be objective. The test is not what wounds the feelings of the most sensitive employee, or even the particular employee who complained. The test is a reasonable employee, similarly situated, in the business circumstances involved.

In cases where employees have claimed retaliation on the basis of trivial changes in behavior, the employee has usually lost. Title VII does not create "a general civility code for the American workplace," the Supreme Court repeated recently in White. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience," the Court said. "[P]etty slights, minor annoyances, and simple lack of good manners" will not deter employees for pursuing their protected rights.

However, the courts will find retaliation when there is a pattern of slights, unfair treatment, and apparent efforts to embarrass or humiliate an employee over a period of time. The manager's actions are not looked at one-by-one to determine if each one is so petty that it should be disregarded. Rather, they are examined as a group, in context, to see if they are bad enough to be retaliatory.

• What if the complaining employee was just wrong? The courts long ago decided that with respect to almost all forms of retaliation for whistleblowing or complaints of illegal activity, the complaining employee need not be right about either the facts or the law, so long as the underlying complaint or report was made in good faith, rather than as a deliberate falsehood. Employers are seldom in the position to prove deliberate falsehood.

This rule recognizes that employees may not know the law. It also reflects a strong public policy to protect the right to complain. If a person could be retaliated against because he was wrong about the law, this would deter employees from complaining about things like discrimination or unsafe work practices, and it would undermine the remedial purposes of the laws.

• May employees obtain protection from retaliation after they have simply raised objections or arguments relating to their day-to-day duties? Most courts have not yet drawn meaningful distinctions about retaliation protections based on whether an employee is "just doing his job" or is engaging in protected activity. The distinction is a vital one, though. In some jobs it may be difficult to differentiate debate about how to perform day-to-day professional duties from disagreements that amount to protected activity. This is particularly true with positions that have a

significant compliance component. That could include in-house lawyer, or human resources, finance, or environmental safety and health professional. Most compliance questions have room for genuine, even passionate debate about interpretation or policy.

Employees in these jobs should not have greater job security just because they can recharacterize their day-to-day work as protected activity. The Tenth Circuit Court of Appeals took that position when it ruled that a personnel director who advised her employer that certain practices were illegal did not engage in any protected activity or assert any right adverse to her employer, because her advice was part of her duties, not opposition to the employer's illegal practices. Similarly, the Ninth Circuit ruled that a personnel director who disagreed with company policies could be terminated – on grounds of not being able to perform his job because he disagreed with the company's policies.

More recently, under the whistleblower protections of Sarbanes-Oxley, another question has emerged: whether an employee's complaints to his managers about unethical business practices, possibly amounting to general fraud, are covered by a law that creates a very favorable burden of proof for the employee, but appears to have been designed to protect whistleblowers who report fraud affecting shareholders.

The boundaries of job duties versus protected activity are murky, given the employee's common law duty of loyalty, and to put the employer's interests ahead of his own.

On May 30 of this year, the U.S. Supreme Court in another case, Garcetti v. Ceballos, found the distinction between protests that are part of a public employee's job duties and protests that a public employee engages in as a citizen is vitally important when the employee claims retaliation for engaging in protected First Amendment activity. In that case, a Los Angeles County assistant district attorney wrote two memoranda criticizing the way sheriff's deputies handled a case. The immoderate tone and the allegations in the memoranda caused his reassignment, transfer, and denial of a promotion.

Simply asking an employer if race played a part in a decision can be enough to constitute protected opposition to discrimination, according to the Fourth Circuit Court of Appeals.

The Court found that the memoranda were not protected First Amendment speech by a citizen, but simply performance of professional duties. The Court said – in phrases that should apply equally to situations of private employment – "The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance." The prospect of First Amendment protection for their writings as citizens "does not invest them [employees] with a right to perform their jobs however they see fit… Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission," the Court said. "[D]isplacement of managerial discretion by judicial supervision finds no support in our precedents."

• **What about the employee who uses complaints to terrorize the boss?** The courts have recognized in some cases that employees may use complaints in ways that hijack the manager's authority and impermissibly disrupt the workplace. These cases turn on strong proof of the employee's unprofessional communications, attested to by multiple witnesses. These communications may involve repeated claims that upon investigation prove to be petty or without merit. They may involve an admission by the complainer that he will "destroy this company," or "get my boss fired."

Careful investigation and documentation is critical to demonstrating this pattern. Complaining employee conduct that is a violation of commonly accepted professional standards may be the basis for discipline and eventual discharge.

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