RETALIATION UPDATE [1]
Employment Law Seminar

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I. RETALIATION CASES ON THE RISE

Despite a 25% increase in the number of charges filed with the EEOC over the last ten years, the percentage of cases filed by protected class remains fairly constant, with most categories showing variations of only a couple of percent one way or another. The one dramatic exception is retaliation cases, which are up a whopping 67% since 2000.[2] The reason is simple: it's easier to prove retaliation than other forms of discrimination.

Title VII prohibits discrimination against any individual "*with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin," or to classify employees or applicants "in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin."[3] To be actionable, the statute requires some form of employment-related harm, or what some courts refer to as an "adverse" or "ultimate" employment action. In contrast, Title VII's anti-retaliation provision prohibits discrimination against an employee or job applicant "because he has opposed any practice made an unlawful employment practice [under Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under Title VII].[4] There is no reference in the statute to any specific type of harm.

The type of harm required to prove discrimination and retaliation are different because they serve different purposes. The discrimination provision promotes equality in employment, while the anti-retaliation provision deters employers from interfering with the efforts of an employee or applicant to obtain or advance enforcement of rights granted to them under Title VII.[5] The difference in purpose "reinforces what language already indicates, namely, that the anti-

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[1] This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.
[2] See EEOC Charge Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
[3] 42 USC § 2000e-2(a) (emphasis added).
[4] 42 USC § 2000e-3(a).
[5] *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 US 53, 63 (2006).

retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[6] A plaintiff alleging retaliation need only show that a reasonable employee would have found the challenged action materially adverse, "which in this context means that the conduct might well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[7] The standard is an objective one, in which context matters.[8] Moreover, retaliation is actionable without any consideration of the underlying discrimination that led to the filing of the retaliation claim.[9]

II. SUPREME COURT EXPANDS SCOPE OF RETALIATION PROVISION

In light of the purpose served by the anti-retaliation provision of Title VII, it was not a huge surprise when the Supreme Court recently held in *Thompson v. North American Stainless, LP*[10] that an employer violates Title VII when it engages in third-party reprisals. In *Thompson*, both the plaintiff, Thompson, and his fiancé, Regalado, worked for North American Stainless (NAS). Regalado filed a discrimination charge against NAS with the EEOC in 2003. Three weeks later, NAS fired Thompson. He sued, claiming that NAS fired him to retaliate against Regalado for filing her discrimination charge. Thompson's case raised two questions: (1) whether it is unlawful for an employer to engage in third-party reprisals, and 2) whether an employee can state a claim under Title VII's retaliation provision when the employee does not engage in any protected activity (*i.e.*, personally oppose discriminatory conduct, file a charge, or participate in a proceeding).

Citing the broad purpose of Title VII's anti-retaliation provision, the Court answered the first question in the affirmative. "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[11] The Court acknowledged a concern that prohibiting third-party reprisals may place the employer at risk any time it fires an employee that has some connection to a different employee who engages in

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[6] *Id.*, 548 US at 64.
[7] *Id.* at 68.
[8] *Id.* at 68-69.
[9] *Id.* at 69-70. While there is no need to prove the underlying claim is valid, the nature of the acts complained of may nevertheless be relevant to evaluating whether the employee asserting the retaliation claim engaged in protected conduct. *See, e.g., Clark County School District v. Breeden*, 532 US 268 (2001), in which the Supreme Court reversed the Ninth Circuit and upheld the district court's dismissal of a retaliation claim where "no one could reasonably believe that the incident recounted [by the plaintiff] violated Title VII." The plaintiff in *Breeden* complained about a single incident that occurred at meeting with her male supervisor and another male employee to review the psychological evaluation reports of four job applicants. One of the reports revealed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." After reading that comment aloud, the supervisor looked at Breeden and said, "I don't know what that means." The other employee said, "Well, I'll tell you later," and both men chuckled. Reversing the district court's dismissal of the claim, the Ninth Circuit had allowed the employee's retaliation claim to go forward, holding that the employee is protected under Title VII's opposition clause if there is a reasonable, good faith belief that that the incident opposed constitutes unlawful discrimination, citing *Trent v. Valley Electric Assn. Inc.*, 41 F3d 524, 526 (9th Cir 1994). The Court noted, but did not decide whether Ninth Circuit's standard for evaluating an opposition claim is the appropriate one. *Breeden*, 532 US at 270.
[10] 131 SCt 863 (2011).
[11] *Thompson*, 131 SCt at 868.

protected activity, but concluded that this concern did not justify "a categorical rule that third-party reprisals do not violate Title VII" or a "fixed class of relationships for which third-party reprisals are unlawful."[12] The Court did say that while "[w]e expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never so," it was not willing to generalize any further.[13]

The question of who may sue under Title VII presented a more difficult question. Title VII grants standing to sue to "the person claiming to be aggrieved" by the violation.[14] At one extreme was a rule limiting standing to the person who engaged in the protected activity. On the other extreme is Article III standing, which affords standing to anyone who can show an injury in fact, caused by the defendant, for which the court has been authorized to grant a remedy.[15] The Court ultimately adopted a middle ground:

> Plaintiff may not sue unless he or she falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for the complaint. *** [Under this test, standing is denied] if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *** We hold that the term "aggrieved" in Title VII incorporates this test enabling suit by any plaintiff with an interest "arguably sought to be protected by the statutes, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII."[16]

III. RETALIATION UNDER OREGON LAW

Unlike Title VII, under which only employers may be liable, Oregon discrimination statutes impose liability on individuals for aiding and abetting discrimination.[17] Whether or not individuals also may be found liable for retaliation is not clear.

Under Oregon law, it is an unlawful employment practice "[f]or any *person* to discharge, expel or otherwise discriminate against any other *person* because that other *person* has opposed any unlawful practice, or because that other *person* has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so."[18] While the statutory definition of the term "person" seems to include employees, the BOLI regulation interpreting the term "person" under the retaliation statute suggests that it is applicable only to employers, with no mention of individual liability.[19]

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[12] *Id.*
[13] *Id.*
[14] 42 USC §2000e-5(f)(1).
[15] *Id.* at 869.
[16] *Id.* at 870 (internal citations omitted).
[17] ORS 659A.030(1)(g) (aiding and abetting).
[18] ORS 659A.030(1)(f) emphasis added). "Person" is defined under ORS 659A.001(9)(a) as "(9) [o]ne or more individuals, partnerships, associations, labor organizations, limited liability companies, joint stock companies, corporations, legal representatives, trustees, trustees in bankruptcy or receivers."
[19] OAR 839-005-0033. Discrimination in Retaliation for Opposing Unlawful Practices.
(1) This rule interprets ORS 659A.030(1)(f).

To date, no Oregon appellate court has passed on whether the Oregon retaliation statute applies to individuals. However, at least two federal judges have dismissed retaliation claims under ORS 659A.030(1)(f) on the ground that the individual defendant was not an "employer."[20] Ater Wynne recently convinced a trial court judge in Multnomah County that the retaliation statute should not be interpreted to apply to individuals.[21] Until there is an appellate ruling on this issue, we expect plaintiffs asserting employment claims to continue the practice of naming individual co-workers as defendants under the Oregon retaliation statute.

IV. CONCLUSION

It is often more difficult to defend against retaliation claims than discrimination clams. Employees do not have to prove the underlying discrimination or that they suffered employment-related harm. When individual employees are named as defendants, it can complicate the employer's defense. In many cases, joining individual defendants will preclude the employer from removing the case to federal court, thereby reducing the employer's chances of having the case dismissed on summary judgment. In addition, having employees as co-defendants increases the possibility that conflicts of interest will arise that make it necessary for employees to retain their own independent counsel, which many employees could not afford. If the named employees are company officers, the employer may be obligated to pay for the defense and any judgment entered, which can exponentially increase the cost of defense.

As with most employment claims, the best defense strategy is to not get sued. Employers can substantially minimize that risk by maintaining good employment practices, such as:

- Having clearly defined employment policies and procedures that are consistently followed;
- Training supervisors to understand and comply with employment laws;
- Promptly documenting employee behavior and performance problems;
- Maintaining an atmosphere where employees feel comfortable coming to management to resolve issues;

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(2) An employer will be found to have unlawfully retaliated against an employee if:
(a) The employee has engaged in protected activity by:
(A) Explicitly or implicitly opposing an unlawful practice or what the employee reasonably believed to be an unlawful practice, or
(B) Filing a charge, testifying, or assisting in an investigation, proceeding, or lawsuit under ORS 659A, or attempting to do so;
(b) The employer has subjected the employee to any adverse treatment, in or out of the workplace, that is reasonably likely to deter protected activity, regardless of whether it materially affects the terms, conditions, or privileges of employment; and
(c) There is a causal connection between the protected activity and the adverse treatment.

[20] *See Ford-Torres v. Cascade Valley Telecom, Inc.*, 2008 WL 551503, at *6 (D Or 2008); see also *Reyna v. City of Portland*, 2005 WL 708344, at *7 (D Or 2005) (holding that plaintiff's claims under ORS 695A.030, including a retaliation claim, "may be brought only against her employer").

[21] *See Jackson v. NetBiz, Inc.*, Multnomah County Court Case No. 1010-14660 (Order dated March 3, 2011).

- Training supervisors to recognize and report high risk situations prior to taking any action; and

- When in doubt, calling legal counsel for a risk assessment prior to taking action.