EMPLOYMENT LAW REPORT

It is the Best of Times; It is the Worst of Times: A Comparative Analysis of Retaliation Claims Under Federal and State Law and Related Strategies for Counsel

By Justin D. Cummins, Sheila A. Engelmeier, and Laurie A. Knocke

INTRODUCTION[1]

Through the seminal ruling in *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) as well as in a series of landmark decisions since then, the United States Supreme Court has repeatedly adopted a liberal approach to anti-retaliation protections in the workplace. Indeed, the United States Supreme Court – which often professes an abiding fidelity to textualism – has essentially read anti-retaliation provisions into statutes that have no textual prohibition against retaliation. The National Labor Relations Board's recent decisions in the social media setting mirror the broad interpretation of anti-retaliation protections that the United States Supreme Court continues to embrace.

The United States Supreme Court's jurisprudence regarding retaliation stands in stark contrast to how discrimination and other employment claims have been treated by the United States Supreme Court. The broad and more employee-friendly application of anti-retaliation protections by the United States Supreme Court also contrasts significantly with how the Minnesota Supreme Court approaches retaliation claims – whether under the Minnesota Whistleblower Act ("MWA"),[2] Minnesota common law, or the Minnesota Human Rights Act ("MHRA").[3]

The differing approach to anti-retaliation provisions have important implications for practitioners as to pre-litigation investigation and counseling, pre-suit strategy and tactics, and post-suit strategy and tactics – as outlined below.

Bicycle Accident Case?

- Internationally recognized Bicycle Safety expert
- Expert in Proper, Safe and Legal Cycling
- Bicycle Crash Investigation Specialist
- 28 years as a police officer and crash investigator
- Bicycle Safety Educator for 30+ years
- Co-author of **The Complete Guide to Public Safety Cycling**

Kirby Beck Consulting

WWW.KBECKCONSULTING.COM
(612) 518-3096

THE APPROACH TO RETALIATION CLAIMS UNDER FEDERAL LAW

The United States Supreme Court has rendered a number of important decisions – all of which appear to favor employees – in the retaliation context. The National Labor Relations Board has taken a similarly liberal approach to defining protected activity and adverse action for purposes of protecting employees under the National Labor Relations Act ("NLRA").[4]

I. Federal Employment And Civil Rights Statutes

Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)
The Court held that adverse action includes any conduct that "***might have*** 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[5] The Court's explanation of the standard has special import for the summary judgment stage of litigation: "[w]e phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. ***Context matters***."[6] Based on that liberal standard, the Court ruled that action not tied to terms and conditions of employment, including exclusion from lunches in this case, can support a valid retaliation claim.[7]

CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008)
The Court held that Section 1981 protects individuals who have complained about potential Section 1981 violations concerning a third party.[8] The Court's decision essentially read an anti-retaliation provision into the statute based on

Congressional action that rejected the Court's prior precedent (which largely limited Section 1981 cases to pre-contract-formation claims).[9]

Gomez-Perez v. Potter, 553 U.S. 474 (2008)
In an opinion by Justice Alito, the Court basically read an anti-retaliation provision into the ADEA.[10] In doing so, the Court again embraced the private attorney general principle: that, to promote full enforcement of the ADEA, employees should be encouraged to make reports of possible violations.[11]

Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 846, 555 U.S. 271 (2009)
In an opinion by Justice Souter, the Court held that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential Title VII violation.[12] The Court reasoned that, if employees could be subject to adverse action for responding to questions during an internal investigation, employees would feel compelled not to report violations against themselves or others – undermining enforcement of the statute.[13]

Thompson v. North Amer. Stainless, LP, 131 S.Ct. 863 (2011)
In a unanimous opinion announced by Justice Scalia, the Court held that adverse action against a third party can support a retaliation claim; the Court determined that the termination of a discrimination complainant's fiancé was such unlawful action because it would dissuade a reasonable employee from asserting rights under Title VII.[14] The Court further found that the third party fiancé has a right to sue because he was in the zone of interest sought to be protected by Title VII's anti-retaliation provision and, therefore, the fiancé was not "collateral damage."[15]

Staub v. Proctor Hosp., 131 S.Ct. 1186 (2011)
In an opinion by Justice Scalia, the Court held that an employer is liable for the animus of an employee who, although not the ultimate decision-maker, influenced the decisional process.[16] The Court's analysis turned on the view that a contrary ruling would enable employers to immunize themselves by simply isolating the ultimate decision-maker from the underlying decisional process.[17] Although this case technically concerned

continued on page 40

SHEILA ENGELMEIER *is a shareholder practicing employment law at Engelmeier & Umanah, P.A. Sheila's tenacity and attention to detail make her extremely successful in advising and litigating employment matters. She handles a full panoply of employment matters, from noncompetes to discrimination or harassment cases. She is a frequent lecturer and has developed and facilitated numerous training programs on a variety of workplace issues, including diversity, avoiding harassment and discrimination and dealing with leaves of absence and a disabled worker.*

LAURIE KNOCKE *is Employment Counsel for Boston Scientific Corporation's Cardiology, Rhythm and Vascular Division. She provides advice and counseling on all aspects of employment related matters, including employee relations, noncompetition restrictions, contracts, discrimination and harassment, compliance, wage and hour issues, and agency matters.*

JUSTIN D. CUMMINS, *a partner at Miller O'Brien Cummins, PLLP, is past Chair of the MSBA's Labor & Employment Law Section as well as a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. Justin has taught courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

discrimination claims, the analysis logically applies to retaliation claims as well.[18]

Kasten v. Saint-Gobain Perform. Plastics Corp., 131 S.Ct. 1325 (2011)
The Court held that the anti-retaliation provision of the FLSA protects employees who only make an oral complaint, rejecting the trend under state law that increasingly requires formal and/or written reports to trigger protection.[19] The Court observed that the text of the statute did not provide sufficient guidance, so the analysis emphasized the importance of considering workplace practicalities.[20] In particular, the Court relied on the private attorney general principle to reason that broad application of anti-retaliations provisions is necessary for the enforcement scheme to be effective.[21]

II. National Labor Relations Act

Hispanics United of Buffalo, Inc., Case No.: 3-CA-27872 (ALJ Decision Sept. 2, 2011)
The Board issued a Complaint alleging that the employer terminated several employees for engaging in protected, concerted activity under the NLRA.[22] The conduct in question included a Facebook posting criticizing the employer's customer service and responsive postings that complained about working conditions.[23] No part of the exchange between employees occurred during work time or through work computers.[24] The employer terminated the employees for allegedly violating the employer's policy against bullying and harassment.[25] The ALJ concluded that the employees' Facebook communications constituted protected activity despite not being directed at the employer or aimed at changing employment terms or conditions because the postings related to the work environment.[26] The ALJ further reasoned that the employees' communications did not forfeit protection under the NLRA.[27]

For a survey of litigation in this area, see National Labor Relations Board, Office of General Counsel, Division of Operations-Management, Memorandum OM 11-74 (Aug. 18, 2011).

THE APPROACH TO RETALIATION CLAIMS UNDER STATE LAW

Beginning in 1987, Minnesota became a leader in the area of whistleblower and other anti-retaliation protection for employees under both common law and statutory provisions. The protection from retaliation has waned since then. In the last several years, while the United States Supreme Court has regularly issued employee-friendly decisions in the retaliation context, the Minnesota Supreme Court seems to have taken a more employer-friendly approach.

I. Minnesota Whistleblower Act

Kratzer v. Welsh Companies, LLC, 771 N.W.2d 14 (Minn. 2009)
The Court set out a test for determining whether a report of wrongdoing would be protected under the MWA. Kratzer was fired after he reported a fellow real estate agent for a "dual agency" transaction – where one agent represents both buyer and seller – and for not informing the seller that the agent would receive a higher commission if he negotiated a lower price for the buyer.[28] The Court said that a whistleblower will be protected if the facts reported constitute a violation of a law or rule adopted pursuant to law.[29] If the facts do not "implicate" a violation of *law*, then the whistleblower is not protected.[30] Thus, the employee was not protected because the reported conduct, unethical behavior, did not violate a statute or regulation, and the case was dismissed.[31]

continued on next page

During December, the MAJ New Lawyer Section headed by co-chairs Courtney Lawrence, Guy Mattson and Ali Sieben conducted a holiday toy drive to benefit the Marine Toys for Tots program.

MAJ greatly appreciates the efforts of the following firms in collecting the toys and from the numerous members who made donations.

Naros Law, P.A.
Minneapolis

Gallagher Law Office, LLC
Eagan

Meshbesher & Spence, Ltd.
Oakdale

Cochrane Law Office, P.A.
Roseville

Paige J. Donnelly, Ltd.
St. Paul

Schwebel, Goetz & Sieben, P.A.
Minneapolis

Ali Sieben and Rochelle Peyton with some of the many toys collected during the Toys for Tots toy drive.

Kidwell v. Sybritic, 784 N.W.2d 220 (Minn. 2010)
Kidwell was a former in-house counsel who was fired when he reported illegal activity to his superiors.[32] A plurality of the Court held that, if an employee's job requires him/her to report illegal activity to the employer, the employee has to do more than his/her normal job to act in good faith and obtain protection under the MWA.[33] Chief Justice Magnuson concurred in the plurality's decision but not with the reasoning, noting that the in-house attorney who shared client confidences should not recover when the client fires him.[34] Chief Justice Magnuson relied, in part, on the special relationship between an attorney and his/her client.[35] In light of this ruling, it appears that a retaliation claim may fail if the "whistleblowing" happens as part of an employee's "normal" duties. However, the dissenting opinion appropriately notes there are federal statutes with similar language that reject the "normal duties" exception suggested by the plurality opinion.[36]

II. Minnesota Common Law

Phipps v. Clark Oil Refining Corp., 408 N.W.2d 569 (Minn. 1987)
This case involved Minnesota's first successful whistleblower claim, predated the Minnesota Legislature's enactment of any employee-protection laws similar to the MWA, and represents arguably Minnesota's only common law exception to the employment-at-will doctrine. Phipps sued his employer after being fired for refusing the employer's directions to fill a customer's gas tank with leaded gas even though the vehicle gas tank was labeled as only for unleaded fuel.[37] Phipps claimed that following his employer's directions would have violated the Clean Air Act.[38] The Court created an exception to the employment-at-will doctrine for employees discharged "for reasons that contravene a clear mandate of public policy."[39] It is an open question whether the common law exception first set forth in *Phipps* still has relevance today, especially given the Minnesota Supreme Court's recent ruling in *Nelson* discussed below.

Nelson v. Productive Alternatives, Inc., 715 N.W. 2d 452 (Minn. 2006)
While the Court held that the MWA does not preclude a *Phipps* claim, the Court ruled in favor of the employer and stated that the employee had not plead an actual violation of the law.[40] Instead, Nelson claimed that he was fired from a non-profit corporation as a result of exercising his rights to vote as a member of the non-profit organization.[41] The Court concluded there was not "a clear public

continued on next page

PROFESSIONAL SETTLEMENT SOLUTIONS GROUP

1605 Zealand Avenue North
Golden Valley, MN 55427
Phone 763-208-0438
Fax 866-839-5853

STRUCTURED SETTLEMENTS

We work Exclusively with Plaintiffs

Unique understanding and insight of Plaintiff/Plaintiff Attorney's concerns and strategies

No defense assigned broker conflicts of interest **No affiliation or allegiance to the defense**

Have your own expert! ***Make us part of your team!***

JEFF SMITH
Former Plaintiff's PI and WC Lawyer and MAJ/MTLA member for over 25 years.
jeffsmith@prossg.com

STEVE HARRIS
Licensed and experienced Structured Settlement Broker and Planner for over 15 years.
steveharris@prossg.com

Settlement Planning
Quote Comparison
Client Educational Materials

Qualified Structured Settlements
Mediation Assistance and Support
Non-Qualified Structured Settlements

Structuring of Attorneys Fees
Qualified Settlement Funds
Document Draft Preparation

Providing Quality Structured Settlement Services to Plaintiffs and their Attorneys

JUSTICE
MINNESOTA ASSOCIATION FOR JUSTICE

WELCOME New Members

Michael C. Ablan, LaCrosse, WI
Ashley N. Bernard, Waite Park
Sheri L. Charley, Minneapolis
Melanie J. Clatanoff, Minneapolis
Jeffrey E. Dilger, St. Cloud
Aaron S. Eken, Minneapolis
Joseph R. Ellig, Fergus Falls
Jason R. Emery, Minneapolis
Molly J. French, International Falls
Nathaniel R. Greene, Minneapolis
Gregory J. Hudalla, Mendota Heights
Rachel M. Knutson, Waseca
Brian F. Laule, River Falls, WI
Imant T. Lisovskis, Minneapolis
Susan McKigney, Fargo, ND
David K. Meier, Woodbury
Ryan J. Miner, Minneapolis
William R. Moody, Minneapolis,
Cheryl M. Pojanowski, Waite Park
Ashley E. Rather, St. Louis Park
David A. Rephan, Minneapolis
Ashley E. Schmidt, St. Paul
Jeffrey D. Schroeder, Minneapolis
Gregory S. Schwartz, Minneapolis
John S. Swimmer, Milwaukee, WI
Patrick A. Toomey, Minneapolis
Ryan O. Vettleson, Minneapolis
Asa J. Weston, Minneapolis

THANK YOU to MAJ SUSTAINING MEMBERS

William D. Harper
Peter A. Schmit
Charles James Suk
Steven J. Terry

policy at stake" largely because the employee had not alleged a violation of any law.[42] Tellingly, the Court noted, "[w]e recognize that the common-law cause of action recognized in Phipps, though still viable, may well be largely duplicative of the cause of action available under the Whistleblower Act."[43]

III. Minnesota Human Rights Act

Bahr v. Capella University, 788 N.W.2d 76 (Minn. 2010)
The Court addressed the issue of what constitutes a reasonable belief that one is opposing a discriminatory practice. Bahr, a manager in Capella's communications department, was terminated after repeatedly asking permission to address an African-American employee's poor performance by putting her on the company's performance improvement plan. Bahr's termination came after a pattern of telling her supervisors that she thought avoiding the employee's poor performance was discriminatory and was harmful to the rest of her team. The Court noted that the standard for a viable claim of reprisal is either a good-faith reasonable belief that Capella's actions were violations of the MHRA or the stricter standard of pleading actions that actually violate the MHRA. The Court found, as a matter of law, that Bahr did not meet the more lenient standard. The Court ruled that "no reasonable person could believe that the practices Bahr opposed were prohibited under the MHRA," and the Court affirmed the dismissal of the lawsuit for failure to state a claim.[44]

COMPARATIVE ANALYSIS OF RETALIATION PRECEDENT UNDER FEDERAL AND STATE LAW

Many scholars and practitioners have debated why the United States Supreme Court has taken such a broad, pro-enforcement approach to anti-retaliation protections while simultaneously taking a narrow view of anti-discrimination and anti-harassment protections under the same employment statutes. Commentators have also puzzled over the sharp contrast in the analysis of retaliation claims by the United States Supreme Court versus the Minnesota Supreme Court.

The most logical explanation for the evident paradox is that a liberal and vigorous application of anti-retaliation protections comports with the United States Supreme Court's apparent policy preference for the out-of-court resolution of disputes. According to this view, an employee will more likely seek resolution of workplace-related concerns via court litigation if he/she thinks his/her discrimination, harassment, or other workplace-related complaints will be met with hostility or adverse action. In addition, employers cannot address workplace-related concerns if they are unaware of them because the employees are afraid to come forward. Thus, the United States Supreme Court stated that employees should be encouraged to come forward by being afforded robust protection from reprisals.

Examples of the policy preference for out-of-court resolutions can be found in the United States Supreme Court requirement that (1) employers have meaningful anti-harassment policies as well as complaint procedures and (2) employees follow those policies and use those complaint procedures.[45] According to the *Faragher/Ellerth* analysis, then, an employer may be liable if it does not do its part to prevent and address harassment (by having appropriate policies and procedures) and an employee may be precluded from pursuing harassment claims if he or she does not do his or her part to address the problem (by using the policies and procedures and in other ways).[46] In short, the United States Supreme Court is pushing the parties to resolve problems without court involvement.

Other manifestations of the United State Supreme Court's policy preference for out-of-court resolution of disputes include the long line of cases that prioritize arbitration over litigation and even

continued on next page

require arbitration in lieu of litigation.[47]

The Minnesota Supreme Court does not have the same history of embracing out-of-court settlements in the way the United States Supreme Court does. Indeed, the Minnesota Supreme Court only recently adopted the *Faragher/Ellerth* paradigm.[48]

BEST PRACTICES FOR COUNSEL

Below is an outline of general considerations and approaches of counsel from the various perspectives in the context of potential or actual retaliation claims.

I. Employer Side: In-House

Addressing behavior and performance problems, or taking other unpopular actions, can present pitfalls when the employee has engaged in protected activity. Below is a list of tips to help avoid retaliation, or the appearance of retaliation, as the workforce is managed:

(1) *Using Human Resources*
--Human Resources should be consulted before any negative action is taken against an employee who has engaged in protected activity;
--Human Resources, not the supervisor, should make the call as to whether a planned adverse action could be retaliation; and
--Human Resources should be present during the communication of the action to the Employee.

(2) *Taking disciplinary or other adverse action*
--Prepare and maintain contemporaneous records of the reasons for the action;
--Provide quality, timely employee evaluations and check those evaluations for information that may undercut the rationale for your action;
--Make sure your actions are consistent with your policies and established practices ***before*** taking action;
--If there is any question that the action may be retaliatory, conduct an investigation to confirm the need for the action before proceeding; and
--Be resolute in any action you take.

(3) *Responding to the employee's complaint*
--Remember that a complaint need not be formal or in writing;
--Respond in a manner that is consistent with your policies and established practices;
--Do not consider the employee's motivation in determining your response;
--Assign a neutral party to conduct the investigation;
--Proceed promptly; and
--Maintain confidentiality (for an action to be retaliatory, the person taking the action must know of the protected activity).

(4) *Managing the Workplace*
--Remember that an adverse action is any action that might dissuade a reasonable worker from engaging in protected activity; this is not a high standard and encompasses a broad range of actions;
--Take affirmative steps to extinguish hostility from other employees in the workplace and, toward that end, consider workplace training and counseling of employees;
--Check in with the employee on a regular basis;
--If the supervisor is aware of the protected activity, counsel the supervisor on managing the employee/workplace situation; and

continued on next page

FORENSIC REPORTS & EXPERT TESTIMONY
A Century of Familly Service in Building Design, Construction, & the Legal Arena

JAMES R. McDONAGH, P.E., F NAFE, F ASCE, D GE.
Consulting Forensic Engineer
500 West County Road B, Suite 237
Roseville, MN 55113
(651) 222-8139 Office
(651) 353-8139 Cell
jamesr@mcdonagh.com

Fellow:
National Academy of Forensic Engineers & American Society of Civil Engineers

Diplomate
Academy of Geotechnical Engineers

NEW ADDRESS
500 West County Road B
Suite 237
Roseville, MN 55113

- Buildin
- Res
- Desig
- Footin
- Geotec ...neering
- OSHA & Safety
- Slip, Trip, & Fall
- Stairways & Ramps
- Wood Engineering
- Structural Component

Certified Forensic Engineer by the National Council of Engineering Specialty Boards

--Make positive gestures when appropriate.

II. Employee Side

Employees have the burden of proof in retaliation cases, so employee counsel should remind employees to identify at least one statute or regulation that is apparently being violated, make complaints in writing whenever possible, and seek clarity from the employer about the reason(s) for any action the employee considers adverse.

Whether for an administrative charge or a court complaint, employee counsel should plead with as much factual specificity as possible in light of the applicable strategic considerations. Pleading in this fashion should highlight the significant nature of the claims, how the plaintiffs wear the proverbial "white hat," and help to discourage/defeat a Rule 12 motion. Pleading with more particularity will also provide support for the all-too-common motions to compel necessary discovery once litigation is underway.

Retaliation claims often have a common-sense, even visceral, appeal that other types of employment claims may not.

MAJ Members .....
Mark Your Calendars

2012
Annual
Convention

August 16, 17 and 18, 2012
Arrowwood Resort
Alexandria, MN

Employee counsel should use the deposition procedure and other discovery mechanisms to highlight the drama of the retaliation to position the employees well for non-dispositive and dispositive motion practice, mediation, and trial.

Employee counsel should also consider an emerging area in retaliation jurisprudence: whether retaliatory harassment claims can be pursued in Minnesota.[49] Pursuit of retaliatory harassment claims may provide advantages to employees during both the discovery and trial phases of litigation by, for example, expanding both the temporal and substantive scope of relevant evidence for purposes of liability and damages.[50]

III. Employer Side: Outside

The approach of outside counsel is similar to in-house counsel outlined above. Outside counsel may have additional approaches from their vantage point on the outside looking in, including the following:

--Consider advising clients to use job descriptions that include the requirement to report any illegalities as a normal part of a given employee's job;
--Consider providing even more training on what is and what is not discrimination or harassment so there is more evidence of employees' "reasonable" belief about discrimination and harassment;
--Consider coaching employers receiving complaints to articulate explicitly at the conclusion of the investigation why the complained-of behavior is not discriminatory, harassing, or otherwise illegal;
--Consider litigating in state court rather than removing retaliation claims to federal court;
--Consider pursuing a Rule 12 motion, especially if the parties draw a judge who thinks Rule 12 is the new Rule 56 after *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); and
--Always highlight in pleadings and legal memoranda what the employer has done correctly.

CONCLUSION

It is not much of an overstatement to say it is the best of times and the worst of times for both employer and employee counsel. Federal law presents significant challenges for employers while providing unique opportunities to employees in the context of retaliation claims. In contrast, Minnesota law generally appears to favor employers rather than employees when retaliation issues come up. Accordingly, counsel on all sides need to advise their respective clients carefully as they closely monitor developments in the law as those changes unfold.

---

[1] A version of this article also appears in the 2011 Labor & Employment Institute manual.
[2] Minn. Stat. §§ 181.931, et seq.
[3] Minn. Stat. §§ 363.01, et seq.
[4] 29 U.S.C. §§ 151, et seq.
[5] *White*, 548 U.S. at 68 (emphasis added).
[6] *Id.* at 69 (emphasis added).
[7] *Id.* at 69-71.
[8] *Humphries*, 553 U.S. at 445.
[9] *Id.* at 449-53.
[10] *Potter*, 53 at 478-79.
[11] *Id.* at 484-86.
[12] *Crawford*, 129 S.Ct. at 849.
[13] *Id.* at 852-53.
[14] *Thompson*, 131 S.Ct. at 868.
[15] *Id.* at 870.
[16] *Staub*, 131 S.Ct. at 1189.
[17] *Id.* at 1189-93.
[18] *See, e.g., McKenna v. City of Phila.*, 649 F.3d 171, 178-81 (3rd Cir. 2011) (affirming the plaintiff verdict because an internal disciplinary hearing did not sever the causal connection between the supervisor's retaliatory animus and the plaintiff's discharge after opposing apparent discrimination).
[19] *Kasten*, 131 S.Ct. at 1329.
[20] *Id.* at 1333.
[21] Id. at 1332-35.
[22] *Hispanics United of Buffalo*, Case No.: 3-CA-27872 at *1.

continued on next page

[23] *Id.* at *4-6.
[24] *Id.* at *6.
[25] *Id.*
[26] *Id.* at *8.
[27] *Id.* at *9 (noting the communications did not take place at work, were related to employment conditions, and did not contain any outbursts).
[28] *Kratzer*, 771 N.W.2d at 15-18; *see also id.* n.5.
[29] Id. at 22.
[30] *Id.*
[31] *Id.* at 23.
[32] *Kidwell*, 784 N.W.2d at 221-23.
[33] *Id.* at 228.
[34] *Id.* at 232-34.
[35] *Id.*
[36] *Id.* at 237.
[37] *Phipps*, 408 N.W.2d at 570-71.
[38] *Id.*
[39] *Id.* at 592.
[40] *Nelson*, 715 N.W.2d at 453-57.
[41] *Id.* at 453.
[42] *Id.* at 455-57.
[43] *Id.* at n.3.
[44] *Bahr*, 788 N.W.2d at 84-85.
[45] *See generally Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).
[46] *Id.*
[47] *See, e.g., AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
[48] *See generally Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558 (Minn. 2008).
[49] *See generally Jensen v. Potter*, 435 F.3d 444 (3rd Cir. 2006) (recognizing that the employee who has raised a complaint of harassment or discrimination is a "protected employee" who can bring a retaliatory harassment claim against her employer under Title VII for subsequent offensive and negative treatment by her supervisors or coworkers); *see also* Minn. Stat. § 363A.15.
[50] *See, e.g., Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002) (holding that the plaintiff could recover for harassment occurring outside of the limitations period).

David Ball on Damages 3: A Plaintiff's Attorney's Guide For Personal Injury and Wrongful Death Cases

Reviewed by Michael T. Courtney
Katz, Manka, Teplinsky, Graves & Sobol

David Ball is back with a new book entitled David Ball on Damages 3: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases. With fresh research and updated ideas it is a must read for every plaintiff's attorney. According to Ball, one third of the jury pool is tort reformed, one third can swing either way, and one third simply does not care. An attorney needs effective tools for combating these biases inherent in today's jury pool and Ball offers them. Drawing from such fields as psychology, neuroscience, marketing, playwrighting, and others, Ball offers an effective way to present a Plaintiff's case.

Damages 3 draws upon his previous books as well as integrates ideas from several other leading works such as Rules of the Road by Rick Friedman and Patrick Malone, and Exposing Deceptive Defense Doctors by Dorothy Sims, among others. While fans of Ball's previous works will find some of the material familiar, he has continued in his research and updates his previous ideas. Some of these changes are subtle, others are not.

The book takes the reader step by step through trial, beginning with the underlying psychology of a juror and what really motives them during trial. From there Ball presents a how to guide to present the Plaintiff's case in a way that will get a jury to listen and motive them to award fair and proper compensation. From Voir Dire, where Ball gives you several great ideas to spot problem jurors, through closing where he gives the reader a template of what information to give the jury and how to communicate that information, this is truly a step by step guide.

Ball also incorporates several great concepts into his appendix, from a chapter dedicated to effectively telling a story in the opening statement to incorporating a memorandum on what a defense medical expert should be allowed to say in trial. One interesting addition is an article focusing on the fact that jurors go online to gather additional information about the case and its participants. Ball provides several resources so that you can be armed with the information before you set foot in the courtroom.

Overall this is an excellent addition to any trial attorney's library. It truly gives a plaintiff's attorney great tools to employ when presenting the case. It is a must read.