Positive Developments in the Law of Protected Activity

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Introduction

Retaliation claims continue to be among the most commonly asserted and most successfully litigated across the nation in employment and civil rights cases. The threshold issue in retaliation cases typically concerns whether a plaintiff has engaged in protected activity within the meaning of the applicable statute. Fortunately for the rule of law and plaintiffs everywhere, both Federal and State law have continued to move in a liberal direction.

I. Protected Activity Under Federal Law

Employees and their counsel may be generally aware that certain conduct could be protected under Federal law and, thus, can serve as the basis for a valid retaliation claim should an employer take adverse action because of such conduct.[1] As discussed below, specific developments in the Federal legal regime have recently reinforced and even expanded the rights of employees in the context of protected activity.

As to Federal employment law, the United States Equal Employment Opportunity Commission ("EEOC") has just promulgated guidelines; this new guidance builds on the broad definition of protected activity adopted by the United States Supreme Court in a long line of retaliation cases since the seminal Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).[2] In particular, the EEOC Enforcement Guidance on Retaliation and Related Issues provides detailed analysis of the extent to which employees can effectively assert that they are engaging in protected activity under an array of employment statutes.[3] To maximize the likelihood of success going forward, Plaintiff counsel should review the EEOC's new guidelines carefully before preparing future EEOC charges and prosecuting corresponding court claims.

Recent decisions under the Federal Constitution parallel the liberal approach adopted under employment statutes referenced above. In Bland v. Roberts, for example, the Fourth Circuit ruled that "liking" a Facebook page qualifies as protected activity under the First Amendment.[4] The plaintiffs, former sheriff's office employees, alleged that the sheriff retaliated against them for supporting the sheriff's political opponent.[5] According to the plaintiffs, they engaged in protected activity when each "liked" the campaign page of the sheriff's political opponent on Facebook.[6] The Court agreed and held that "liking" the Facebook page qualified as protected speech because clicking the "like" button is a "substantive statement."[7] The Court further explained that "liking" a campaign page is protected activity because that action "communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."[8]

New developments in Federal labor law provide perhaps the most pro-employee authority when it comes to protected activity. Section 7 of the National Labor Relations Act ("NLRA")[9] – which affords employees protection from employer interference with the ability to act "for mutual aid or protection" – governs whether or not the workplace is unionized and whether or not the employee(s) involved are union members.[10] Accordingly, the National Labor Relations Board ("Board") Office of the General Counsel's recently issued Memorandum, which explains the Board's broad interpretation of protected activity, applies to all workplaces and all employees.[11]

When evaluating whether an employee has engaged in protected activity under the NLRA, the Board continues to consider the totality of the circumstances. In Pier Sixty, LLC, the Board determined that the NLRA protected an employee's Facebook comments – despite the remarks containing obscene language – because the comments implicated employment terms or conditions.[12] The employee at issue declared via social media as follows about a manager in the workplace: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[13]

II. Protected Activity Under State Law

Employees and their counsel may also know that specific conduct could be protected under State law and, therefore, can serve as grounds for a viable retaliation claim if an employer takes adverse action in that regard.[14] Emerging developments under the State framework, like in the Federal legal regime, provide greater rights for plaintiffs regarding protected activity.

For starters, the Minnesota Legislature recently amended the State whistleblower law to revise the statutory definitions of "good faith," "report," and ultimately protected activity as a whole.[15] In addition, the amendments have created a new cause of action for State government employees penalized for providing information to the Legislature or a constitutional officer, such as the Attorney General, concerning State services.[16] In short, the amended State whistleblower law prohibits employers from retaliating based on an employee's good faith reporting a violation, suspected violation, or planned violation of legislatively, administratively, or judicially established law – even if an employee's job duties required such reporting.[17]

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[1] See, e.g., 42 U.S.C. § 2000e-3(a) (prohibiting employers from retaliating based on an applicant or employee opposing discriminatory conduct, filing a charge of discrimination, or participating in an investigation or proceeding concerning alleged discrimination); 29 U.S.C. § 623(d) (same); 18 U.S.C. § 1514A (prohibiting publicly traded companies from retaliating based on an employee's report of conduct he or she reasonably believes constitutes a violation of specified Federal anti-fraud statutes, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any Federal law relating to fraud against shareholders); 15 U.S.C. § 78u-6 (prohibiting retaliation based on an employee's reporting of a violation of the securities laws to the SEC or participating in an SEC investigation or proceeding).

[2] Dep't of Homeland Security v. McClean, 135 S.Ct. 913, 920-24 (2015) (in an opinion authored by Chief Justice Roberts, ruling that the whistleblowing at issue was protected activity even though it violated a federal regulation); Kasten v. Saint-Gobain Perform. Plastics Corp., 563 U.S. 1, 4-5 (2011) (holding that the anti-retaliation

provision of the Fair Labor Standards Act 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); Crawford v. Metropolitan Government of Nashville, 555 U.S. 271, 273-74 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential violation); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 445 (2008) (holding that Section 1981 protects individuals who have complained about potential violations concerning a third party).

[3]EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016), accessed at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm.

[4]730 F.3d 368, 386 (4th Cir. 2013).

[5]Id. at 372.

[6]Id. at 380.

[7]Id. at 386.

[8]Id.

[9]29 U.S.C. § 157.

[10]Id.

[11]OFFICE OF THE GENERAL COUNSEL, DIVISION OF OPERATIONS-MANAGEMENT, MEMORANDUM OM 12-59 (May 30, 2012).

[12]362 NLRB No. 59, *5 (2015).

[13]Id.

[14]See, e.g., Minn. Stat. § 363A.15 (prohibiting employers from retaliating based on an applicant or employee opposing discriminatory conduct, filing a charge of discrimination, or participating in an investigation or proceeding concerning alleged discrimination).

[15]Minn. Stat. § 181.932.

[16]Id.

[17]Id.

[18]2014 WL 7011353 (Minn. Ct. App. 2014), rev. denied (Mar. 17, 2015).

[19]Id.

[20]Minn. Stat. §§ 179A.01, et seq.

[21]Minn. Stat. § 179A.06, Subd. 7 ("Public employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

[22]Int'l Union of Op. Engrs. Local No. 49 v. City of Mpls., 233 N.W.2d 748, 752 (Minn. 1975).

[23]363 N.W.2d 126, 129-30 (Minn. Ct. App. 1985).

[24]Id.

[25]Id. at 129-30.

Not surprisingly, the Minnesota Court of Appeals has taken a pro-employee approach to protected activity under the State's whistleblower law. In Weber v. Minnesota Sch. of Bus., Inc., the Court rejected the employer's argument that the plaintiff's discussions about the plaintiff's concerns cannot be protected activity because such reporting was allegedly one of the plaintiff's job duties.[18] In other words, there no longer is a blanket job-duties exception to the definition of a report for purposes of engaging in protected activity.[19]

The Minnesota Legislature also recently amended the Public Employment Labor Relations Act ("PELRA"),[20] the NLRA's State analog for public employees. The PELRA amendments expressly include the equivalent of Section 7 rights under the NLRA for public employees in Minnesota, effective July 1, 2017.[21]

Even before the recent amendments of the PELRA, however, the Minnesota Court of Appeals has followed Board precedent under the NLRA. This should not be surprising because the Minnesota Supreme Court has long held that decisions by the NLRB under the NLRA guide interpretation of the PELRA.[22] In Marshall County Educ. Ass'n v. I.S.D. No. 441, prior to amendment of the PELRA, the Court of Appeals recognized that employees have an affirmative right under the PELRA's Expression of Views provision to express or communicate a "grievance" without being subject to discharge or discipline.[23] Citing Minnesota Supreme Court precedent, the Court reasoned that the term "grievance" must be liberally construed.[24] The Court then held that the employee's contract negotiations for which she was terminated "arose out of" her previously withdrawn grievance, so her termination violated the PELRA.[25]

Conclusion

The trajectory for the scope of protected activity continues to be highly favorable under both Federal and State law. That said, employees do not have a blank check to disregard an employer's lawful and reasonable workplace policies, procedures, and practices. Instead, the expansion of rights discussed above simply functions to encourage employees to take appropriate action in furtherance of the public interest and safety regarding employer misconduct by protecting those employees from illegal retaliation.