Anti-Retaliation Protections in the Workplace in 2017 and Beyond

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Introduction

In the past year, the country has witnessed volatile and even explicitly vindictive behavior by people in powerful positions. This is troubling for many reasons, and it has direct implications for the workplace because of the general disparity in power and voice at work. In short, the tone set at the top affects everyone else to one degree or another.

Under these circumstances, maintaining and even expanding robust anti-retaliation protections in the workplace is essential. Although the current administration put a judge on the United States Supreme Court who is highly skeptical of employment and civil rights claims – as reflected in questioning of the nominee by Senator Al Franken during Congressional hearings – that action, alone, will not destroy anti-retaliation protections.

The broad and pro-plaintiff nature of anti-discrimination law has be established through a long line of cases decided by the United States Supreme Court, including those authored by Chief Justice John Roberts or by Justice Samuel Alito. Recent developments at the State level also provide expansive protections to employees. Nonetheless, plaintiff counsel must be vigilant in asserting retaliation claims properly and prosecuting them effectively so that the doctrine does not go in the wrong direction. To that end, this article outlines the doctrine as it exists today and as it should be in the future.

I. Federal Anti-Retaliation Law Remains Strong in Favor of Plaintiffs

That the robust enforcement of anti-retaliation protections should continue even now comports with the United States Supreme Court's policy preference for the out-of-court resolution of disputes. In that regard, as exemplified by several recent pro-arbitration decisions, the Supreme Court has essentially outsourced the dispute resolution function of the courts in an expanding array of cases.

The ongoing broad application of anti-retaliation protections advances the United States Supreme Court's outsourcing agenda in at least two respects. First, according to the United States Supreme Court's evident perspective, employees will be less likely to litigate if they think their discrimination, harassment, and other workplace-related complaints will be addressed appropriately by employers rather than trigger reprisals. Second, from the United States Supreme Court's vantage point, employers will be more likely to address workplace-related

concerns and, therefore, avert litigation when employees feel free to come forward with their complaints to employers.

In short, although litigation in the lower courts may create marginal doctrinal permutations, the general plaintiff-friendly approach should continue much as before. The cases that provide the legal architecture for robust anti-retaliation protections going forward at the Federal level include the following:

- *Dep't of Homeland Security v. McClean*, 135 S.Ct. 913, 920-24 (2015) (in an opinion authored by Chief Justice John 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 compel protection);
- *Thompson v. North Amer. Stainless, LP*, 562 U.S. 170, 173-75 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, concluding that adverse action against a third party can support a retaliation claim);
- *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);
- *Gomez-Perez v. Potter*, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, basically reading an anti-retaliation provision into the Age Discrimination in Employment Act);
- *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); and
- *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (ruling that what constitutes adverse action in support of a retaliation claim is anything which "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'").

To the extent defense counsel are now arguing that the "but for" causation standard should somehow be applied in anti-retaliation cases, the ultimate outcome of most cases should not change. In a case emanating from the Eighth Circuit, *Burrage v. United States*, the United States Supreme Court directly addressed the meaning of "but for" causation when discussing an employment case, *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013).[1] In that context, the United States Supreme Court quoted legal authority describing "but for" causation as "the ***minimum concept of cause***."[2]

The Supreme Court's unanimous opinion in *Burrage* – which Justice Antonin Scalia authored – ultimately framed the analysis of "but for" causation through a number of metaphorical examples.[3] Perhaps the most helpful metaphor for plaintiffs is the following:

> [The predicate act is the "but for" cause if] the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so – if, so to speak, ***it was the straw that broke the camel's back***.[4]

In so doing, United States Supreme Court confirmed that the evidentiary standard governing retaliation claims is not onerous and, in fact, continues to be the lowest threshold for establishing a causal connection even after *Nassar*.[5] Not surprisingly, then, the Eighth Circuit has held that a jury may infer causation simply from the evidence that the employer's rationale for adverse action was pretext for retaliation.[6]

II. State Anti-Retaliation Law Also Remains Strongly in Favor of Plaintiffs

Retaliation claims continue to receive favorable treatment under Minnesota law as well. For example, the Minnesota Supreme Court has ruled that plaintiffs have the right to a jury trial in workers' compensation retaliation cases and, moreover, that employers in those cases cannot use the *Faragher/Ellerth* affirmative defense that has defeated so many harassment claims over the years.[7] More recently, the Minnesota Supreme Court has held that employers cannot use an employee's immigration status as a defense to a workers' compensation retaliation claim.[8]

In addition to positive rulings by the Minnesota Supreme Court, the Minnesota Legislature has amended the State's whistleblower law to make vital and pro-plaintiff changes to the statute. The State whistleblower law now protects employees when they, in good faith, report – verbally or in writing – any actual or apparent violation of a legislatively, administratively, or judicially established standard by the

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[1]134 S.Ct. 881, 887-88 (2014).

[2]*Id.* at 888 (emphasis added).

[3]*Id.*

[4]*Id.* (emphasis added).

[5]*Id.*

[6]*Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013).

[7]*See generally Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 669 (Minn. 2014).

[8]*Sanchez v. Dahlke Trailer Sales, Inc.*, Court File No.: A15-1183 (Minn. 2017), http://caselaw.findlaw.com/mn-supreme-court/1866157.html

[9]Minn. Stat. § 181.931, Subds. 4, 6, as amended; Minn. Stat. § 181.932, Subd. 1, as amended.

[10]Minn. Stat. § 181.931, Subd. 4, as amended.

[11]*Id.*; Minn. Stat. § 181.932, Subd. 1, as amended.

[12]Minn. Stat. § 181.932, Subd. 1, as amended.

[13]Minn. Stat. § 181.931, Subd. 5, as amended.

[14]*Id.*

employer or a third party.[9] In that regard, good faith reports include anything that is not akin to fraud.[10] Among other things, this means that Minnesota's whistleblower law protects employees when making reports even if doing so is part of their job.[11] Moreover, the amended law protects those who report anticipated violations.[12] Significantly, an employee needs not be fired or suffer other economic loss to experience adverse action.[13] Retaliation for purposes of a whistleblower claim now is any "conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party."[14]

Conclusion

Anti-retaliation law continues to be a bright spot for employees and other plaintiffs, both in Federal court and in State court. Plaintiffs and their counsel should not be complacent, however, because efforts to roll back hard-fought victories are underway. Therefore, plaintiff counsel should not overreach when asserting and prosecuting retaliation claims and, furthermore, must be ready to counteract efforts by defense lawyers to distort the doctrine.