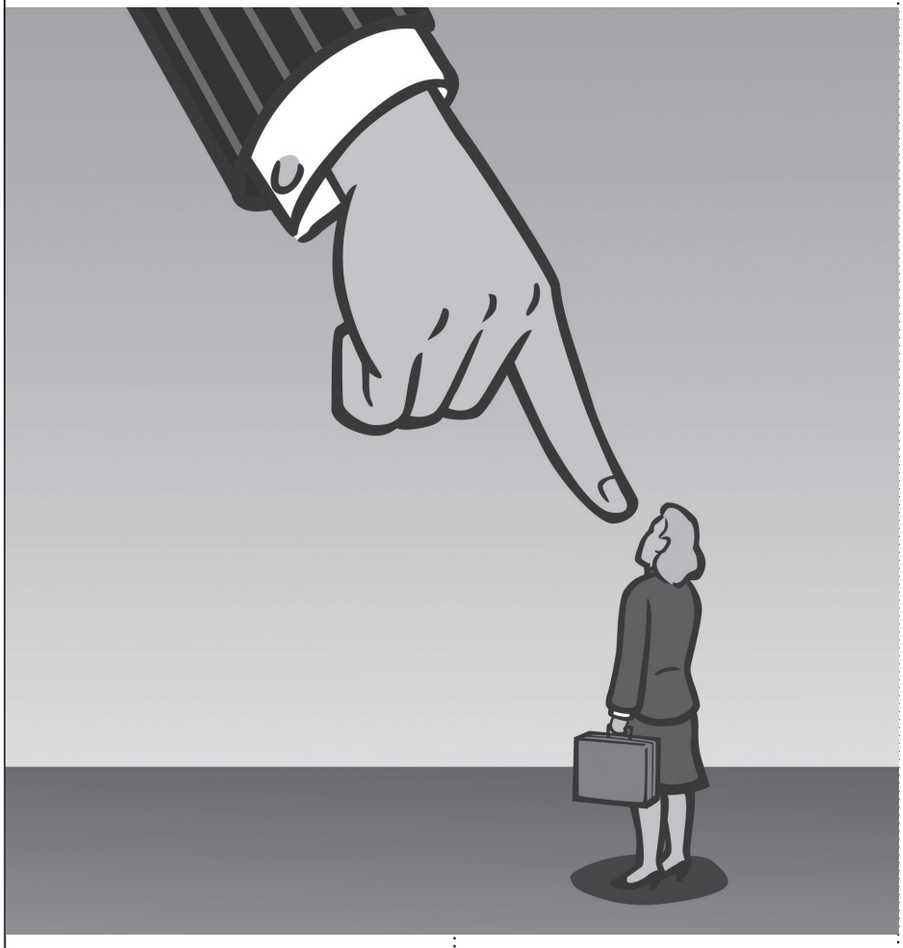
Third-Party Retaliation and the Ways an Employer Can Protect Itself

by Dawn Perez



Retaliation is the primary charge filed with the Equal Employment Opportunity Commission (EEOC), and records indicate that the number of retaliation charges has nearly doubled within the last ten years.[1] Retaliation cases are oftentimes most troublesome to an employer because they can be fairly easy to allege and prove, mainly because an employee essentially never has to show that he or she was subjected to any harassment or discrimination. However, in *Thompson v. North American Stainless, LP*,[2] the United States Supreme Court broadened the scope of retaliation by ruling, in its January 24, 2011 decision, that third parties may have standing to sue.

The plaintiff, Thompson, and his then fiancée, Regalado, were employed by North American Stainless, the defendant. Their relationship was "common knowledge" at the workplace.[3] Regalado filed a charge with the EEOC against the employer, alleging gender discrimination. Approximately three weeks after the employer received notice of Regalado's EEOC charge, it discharged Thompson from employment. Thompson filed suit under Title VII of the Civil Rights Act of 1964,[4] alleging that his termination was retaliation against Regalado for her EEOC charge. Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII.[5] The statute permits "a person claiming to be aggrieved" to file a charge with the EEOC.[6] The employer, however, maintained that Thompson was terminated from employment for valid, performance-based reasons.[7]

The district court awarded summary judgment in favor of the employer, holding that Thompson failed to state a claim under the anti-retaliation and anti-discrimination provisions of Title VII.[8] Thompson appealed. After a panel of the U.S. Court of Appeals for the Sixth Circuit reversed, the Sixth Circuit granted rehearing en banc and affirmed by a 10-6 vote.[9] Thompson, it held, had not engaged in a statutorily protected activity and, as a result, was not included in the class of individuals Congress intended to protect by creating the anti-retaliation cause of action. The Sixth Circuit declined to find that Thompson fell within the plain language of the statute, and cited, as supporting evidence, the fact that no other circuit had found that Title VII extended to third-party retaliation claims.[10]

On appeal, the Supreme Court reversed and held that employers could, in fact, be prohibited from retaliating against employees who had not engaged in any protected activity themselves, but were related to or associated with an employee who had complained of a Title VII violation. Regalado's filing of an EEOC charge was clearly protected conduct under Title VII. Section 704(a) of Title VII created a cause of action for third-party retaliation for persons who had not personally engaged in a protected activity or personally opposed the employer's alleged discriminatory conduct.[11] The Court held that the anti-retaliation provision of Title VII had to be broadly construed in order to cover a "broad range of employer conduct."[12] The provision was "not limited to discriminatory actions" that affected the terms and conditions of employment, but was to be viewed so as to prohibit any employer action that could dissuade a reasonable worker from "making or supporting a charge of discrimination."[13] The Court thought it "obvious" that any reasonable person could be dissuaded from engaging in a protected activity if she believed her fiancé would be terminated from employment as a result.[14]

After reaching the conclusion that Thompson's termination and similar third-party reprisals might engage Title

VII, the Court relied on a "zone of interest" test to assess which third parties (relatives and others) had standing to sue. The term "aggrieved" in the statute had to be "construed more narrowly than the outer boundaries of Article III,"[15] but it was found to extend to persons who fell within the "zone of interests protected by Title VII."[16] Applying that test in the *Thompson* case, the Court concluded that Thompson came within the zone of interests protected by Title VII. Accepting the facts as alleged, Thompson became collateral damage, so to speak, of the employer's unlawful act, and injuring Thompson was the employer's intended means of harming Regalado. In these circumstances, Thompson (as an employee) was well within the zone of interests sought to be protected by Title VII and, therefore, had standing to sue.[17]

Now What?

The Court's decision in *Thompson* will likely open the door to a number of new retaliation cases. By ruling that the termination of a fiancé could reasonably dissuade an employee from engaging in a protected activity, the difficulty, then, becomes in determining whether *all* third-party reprisal, no matter what the relationship between the employees, violates Title VII.

The *Thompson* case should not impact an employer's right to legitimately discipline an employee, even as far as termination, regardless of that employee's relationship with a fellow employee. What the *Thompson* case does do is add to the burden the employer already has to ensure that appropriate documentation for any materially adverse employment decision is created and maintained in the event the decision is challenged.

Employers are urged, now more than before, to avoid the *perception* of retaliation. Employers must be cognizant that, if discipline of an employee is warranted, the discipline must be reasonably fair and consistent with the past practice of the organization. Following *Thompson*, employers are now required to conduct a careful analysis of all employment decisions to ensure that no act of retaliation has occurred. Employers are strongly advised to document carefully, and keep accurate records of, an employee's failure to conform with or abide by the employer's rules of conduct or expectations of performance. So long as an employer: can show a careful analysis was performed to eliminate possible retaliation, refrains from inconsistency in disciplinary actions or disparate treatment in the proposed level of discipline, and has documentation in support of disciplinary decisions, then, regardless of *Thompson* and its third-party coverage, the organization will find itself better equipped to defend retaliation actions.

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Fully Understanding Retaliation

Retaliation takes many forms. Some individuals refer to it as revenge, payback, or simply "getting even." Individuals grasp the meaning of retaliation early on in life, such as when their sibling or childhood friend "tattle" on them. However, as individuals mature, "tattling" evolves into more complex retaliation, and the harm imposed may be more severe.

Examples of such retaliation consist of (a) a loss of promotional opportunities, (b) demotion, (c) unfavorable changes in shift schedules, (d) ostracizing or excluding by others, causing the victim to feel left out, (e) the withholding of information to the detriment of the victim, (f) job loss or termination. Employers must be cognizant, as well, of the incentives or motives for employees to retaliate in the workplace. Such incentives may occur in various circumstances—when an employee is found to have *not* engaged in serious misconduct, resulting in severe discipline, he or she may feel an incentive to retaliate against the complaining party or victim. In another scenario, an employee discharged from employment may feel a need to retaliate against the employer or supervisor. Employers must also be mindful of possible retaliation by employees who have been found to have not engaged in misconduct after an administrative investigation. In the aftermath of an administrative investigation, the employee (while cleared of misconduct) is still left to deal with any resulting embarrassment, disruption to their personal life, anxiety, and depression, thereby giving rise to a possible reason for retaliation. An individual's reaction to being accused of wrongdoing, whether proven or unproven, may include the natural human emotion of vindictiveness. What can be prevented is how the employee reacts to that emotion, and whether he or she allows that emotion to express itself in the workplace. The employer's responsibility is to ensure employees are aware of the employer's policy against retaliation and of the existing avenues for help and guidance, such as through an an Employee Assistance Program (EAP) or through the human resources department.

Other scenarios employers need to be cognizant of result from when an employee's human inclination to extract revenge or retaliate is shared by other employees, thereby giving rise to a workplace "alliance" against an employee complaining of wrongdoing

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or misconduct. For example, supervisors in the employee's chain of command may take offense to a complaint because they feel it reflects poorly on their management skills, or suggests that they were not performing effectively. Higher-level managers may take offense at the "waste" of resources and time expended on complaints, and the administrative investigations or disciplinary actions that come in their wake.

If retaliation is not addressed in the workplace effectively, it more likely than not will lead to litigation. The employee who alleges he or she was subjected to retaliation will be able to include workplace behavior as part of their case, in front of a jury of peers, being people who may have experienced some form of retaliation themselves. A jury that understands such behavior is likely to feel sympathy on the plaintiff's behalf, which may result in a favorable verdict for the plaintiff.

Taking retaliation seriously in the workplace is important not just for the obvious reasons, but for the simple reason that retaliation has become the fastest growing employment-related legal and regulatory agency claim. According to EEOC statistics released in January 2011, the agency received a record-breaking number of charges in 2010,[18] the highest number since 1965 (the year the EEOC was founded). The total number of charges filed for retaliation with the EEOC was 36,258, becoming the most frequently-filed charge.[19]

In addition, courts and government agencies have made it clear that employers have an obligation to take reasonable steps to prevent and correct retaliation in the workplace. However, no courts or statutes have, as yet, established a comprehensive, detailed, or definitive set of required steps or actions needed to meet the legal standard of "reasonable efforts to prevent and correct" harassment, discrimination and retaliation. However, the following preventative and effective measures are highly encouraged for employers to incorporate: clear, specific and fully communicated anti-harassment policies; prompt, thorough and impartial investigations; and high-quality interactive management education for supervisors.

Harassment, Discrimination, and Retaliation Policies

Every organization should have an effective "Equal Opportunity Policy" that prohibits harassment, discrimination, and retaliation in the workplace. It is highly recommended that organizations separate retaliation, and create a stand-alone policy that prohibits any type of retaliation against an employee. In the past, a policy could limit the prohibition of retaliation against any employee who engaged in a protected activity; however, due to the *Thompson* case, employers must now be aware of the possibility of third-party individuals bringing claims of retaliation and should amend their retaliation policy to reflect this development.

Taking retaliation seriously in the workplace is important not just for the obvious reasons, but because retaliation has become the fastest growing employment-related legal and regulatory agency claim.

First and foremost, it is important to educate employees as to what constitutes harassment, discrimination, and retaliation. The term "employees" should not refer solely to subordinates or lower-level employees: all employees, from higher-level management, to mid-level management, to voluntary interns, should be educated by the organization as to its employment policies. By educating employees, an organization ensures that each and every employee is made aware of the organization's position against harassment, discrimination, and retaliation, and that all employees are provided with the necessary tools to recognize such misconduct. The ability to recognize such misconduct is the first step in addressing the matter and ascertaining an appropriate remedy.

Second, it is important to establish a level of trust and communication between management and subordinate employees with regard to such policies. Every employee should be aware of the available avenues for reporting a complaint of harassment, discrimination, or retaliation. In addition, employees need to be aware of their duty, as employees, to report such acts of misconduct, regardless of whether the employee was the victim or merely a witness or bystander. Employees need to understand the zero-tolerance goal for such misconduct. Without the trust and cooperation of employees in helping to create a workplace free of harassment, discrimination and retaliation, the number of charges filed with EEOC, and the number of lawsuits filed against employers, will surely continue to increase.

The trust factor comes into play when an employee comes forward and files a complaint of harassment, discrimination or retaliation. Every organization must have in place a process wherein all complaints are investigated thoroughly and efficiently. The complaining employee, in coming forward, will most likely be fearful of retaliation. It is up to the employer to protect employees who have engaged in such protected activity, by having strong management, as well as strong zero-tolerance policies, that will ensure complaining parties are not retaliated against. This includes protecting the integrity of the investigation by creating a confidential administrative process that requires all employees involved in an administrative investigation to adhere to. This will not only minimize the possibility of retaliation, but will minimize the disruption to the workplace.

A Supervisor's Responsibility

Supervisors are relied upon by an organization to effectively carry out its rules, policies, and directives.

More importantly, supervisors, because of their position in the organization's hierarchy, are held to a higher standard when it comes to reporting allegations of harassment, discrimination, or retaliation.[20] Once a supervisor has been placed on notice of possible harassment, discrimination or retaliation, the organization is deemed to have been placed on notice even if the complaining party has not filed a formal complaint.[21] Further, when an individual in a supervisory capacity fails to act against or to report misconduct, he thereby diminishes (and possibly destroys) the trust level between himself and the employees he oversees. This breakdown in trust will eventually negatively affect the workplace environment, the chain of command, and the morale among the employees. While at times, this breakdown of trust can be repaired, it may be irreversible in some cases.

Elements of Effective Prevention Practices

The following is a short summary of the major elements of an effective program that an organization should follow, implement, and use in assessing its current policies:

- There must be a clear and unambiguous commitment to establishing a workplace free of harassment, discrimination, and retaliatory conduct.
- The organization must establish and maintain a workplace environment that supports anti-discrimination efforts.
- There must be clear, unambiguous, and effective communication of anti-discrimination, anti-harassment, and anti-retaliation policies and procedures, including effective complaint and remedial processes.
- The organization must make it a priority to effectively educate all of its employees, especially management employees, about their absolute duty and responsibility to refrain from harassment, discrimination, and retaliation against co-workers.
- The organization must make it a priority to effectively educate all of its employees, especially management employees, about their rights and responsibilities under the organization's policies.
- The organization must enforce the anti-discrimination, anti-harassment and anti-retaliation policies equally throughout the organization.
- An organization must have an effective process to thoroughly and efficiently investigate all complaints of possible harassment, discrimination, and retaliation.
- The organization must have established appropriate remedial and deterrence efforts, including disciplinary action.
- The organization must establish adequate documentation and record-keeping methods.

Harassment, discrimination and retaliation allegations are very serious. If employers take the opportunity to ensure adequate compliance methods, educate their employees, hold their employees accountable and instill clear and unambiguous policies, they will find themselves better prepared in the event of litigation.

Notes

1. Lori A. Higuera and Carrie Pixler, *2010 EEOC Statistics: Second Consecutive Year of Record High Discrimination Claims*, Fennemore Craig P.C. Labor and Employment Update, Jan. 11, 2011 at http://www.fclaw.com/newsletter/newsletter.cfm?id=1058 (last visited May 13, 2011). For the statistics, *see* EEOC, *Enforcement and Litigation Statistics*, at http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm (last visited May 13, 011) (listing statistics on charges of employment discrimination under each of the statutes enforced by the EEOC, and by the various types of discrimination).
2. 131 S. Ct. 863 (2011).
3. Thompson v. North American Stainless, LP, 567 F.3d 804, 806 (6th Cir. 2009).
4. 42 U.S.C. § 2000e, *et seq.* (West 2011) (hereinafter "Title VII").
5. 42 U. S. C. §2000e-3(a) (West 2011).
6. 42 U.S.C.A. § 2000e-5 (West 2011).
7. The issue before the Supreme Court was whether Thompson was a person aggrieved with standing to sue under Title VII, and not whether his firing was for cause.
8. Thompson v. North American Stainless, LP, 435 F. Supp. 2d 633 (E.D. Ky. 2006).
9. Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. 2008), *aff'd banc,* 567 F.3d 804 (6th Cir. 2009).
10. 567 F.3d 804, 811 (6th Cir. 2009).
11. 131 S. Ct. 863, 868 (2011).
12. *Id.*, citing *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006).
13. *Id.*
14. *Id.*
15. *Id.* at 869.
16. *Id.* at 870.
17. *Id.*
18. EEOC, *Enforcement and Litigation Statistics, supra* note 1.
19. *Id.*
20. *See* Keisha-Ann G. Gray, *Responsibility for the Actions of Others*, Human Resource Executive Online (Feb. 22, 2010) at http://www.hreonline.com/HRE/story.jsp?storyId=341419337 (last visited May 13, 2011). Note that some state statutes allow for supervisors to be held personally liable if they have been found to have aided and abetted in prohibited discriminatory conduct. New York law prohibits an employer from engaging in specified forms of discrimination against employees, and from discriminating against any person because he or she had opposed any practices forbidden under that law or because he or she had filed a complaint. N.Y. EXEC. LAW § 296(1) (McKinney 2010). An individual may be found liable for an unlawful discriminatory practice if he or she aids, abets, incites, compels or coerces the doing of any of the acts forbidden under the law, or to attempts to do so. N.Y. EXEC. LAW § 296(6) (McKinney 2010).
21. *See, e.g.,* Huston v. Procter & Gamble Paper Products Corp., 568 F.3d 100 (3d Cir. 2009) (an employee's knowledge of allegations of coworker sexual harassment may be imputed to the employer under Title VII where the employee is sufficiently senior in the employer's governing hierarchy, or is otherwise in a position of administrative responsibility over employees under him, so that such knowledge is important to the employee's general managerial duties). ML