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BEHIND EVERY DISCRIMINATION CLAIM LURKS A POTENTIAL RETALIATION CLAIM

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Earlier this year, in [Mickey v. Zeidler Tool and Die Co.](#), the Sixth Circuit Court of Appeals upheld the lower court's dismissal of an employee's claim that his salary and benefits were reduced because of his age. However, the court reversed the dismissal of an employee's claim that he was discharged in retaliation for filing a Charge of Discrimination. *Zeidler Tool* illustrates that a potential retaliation claim lurks behind every formal or informal complaint of discrimination, regardless of the merit of the underlying complaint.

Statutory Prohibitions Against Retaliation

In addition to prohibiting discriminatory employment acts, virtually every federal and state employment discrimination statute includes a provision prohibiting retaliation against employees who oppose discriminatory acts. Typically, these anti-retaliation provisions contain what are commonly referred to as a "participation clause" and an "opposition clause."

Participation clauses protect an employee from retaliation for having participated in proceedings to enforce the law in

question, such as filing a Charge of Discrimination with the Equal Employment Opportunity Commission (the "EEOC"), or for testifying before a court or agency to support a claim of discrimination on someone else's behalf. Both the person claiming they were discriminated against and witnesses testifying in support of claims of discrimination are protected by participation clauses.

Opposition clauses are broader than participation clauses. Opposition clauses protect employees who have expressed opposition to discrimination, even if they have not participated in formal enforcement proceedings (e.g., informal complaints to an employer about discrimination, and internal grievances). Opposition clauses protect both employees who complain about discrimination against themselves, and employees who complain about discrimination against others.

Significantly, employees are generally protected by anti-retaliation provisions even if the conduct of which they complain does not actually violate the law. For example, Title VII's opposition clause protects an employee who opposes conduct that does not actually violate Title VII, as long as the employee had a reasonable and good faith belief that the conduct violated Title VII. Similarly, Title VII's participation clause protects an employee who files a Charge of Discrimination even if a court ultimately decides that the employer's conduct did not violate Title VII. This was what happened in *Zeidler Tool*.

The Court's Decision in *Zeidler Tool*

In *Zeidler Tool*, the Court of Appeals affirmed the lower court's dismissal of the employee's claim that the company reduced his salary and hours because of his age. However, the Court concluded that the employee had established a *prima facie* case of retaliation merely because of the close proximity of time between when the employee filed the Charge of Discrimination with the EEOC and the company's discharge of the employee (the company discharged the employee the same day the owner learned the employee had filed the Charge).

Because the employee had established a *prima facie* case of retaliation, the employer was required to articulate legitimate, non-discriminatory reasons for the employee's discharge. The company asserted that it had discharged the employee because of its financial condition, the employee's poor performance, and a lack of work the employee could perform. But the Court found the evidence supporting these assertions questionable, and ordered that a trial be held. The Court observed:

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- the evidence reflected that the employee was discharged just as the company began to show a substantial profit after sustaining a loss the prior year;
- the company did not keep detailed personnel records, and the employee's personnel file lacked any record of negative evaluations (instead, his personnel record included evidence of pay raises on a fairly regular basis);
- the company admitted that, around the time of the employee's discharge, it ran several advertisements seeking employees to perform jobs that it conceded the employee was qualified to perform; and
- the company's owner testified in an inconsistent manner regarding whether he was aware that the employee had filed his Charge of Discrimination before he discharged him.

What Should an Employer Do?

Every time an employer receives an informal or formal complaint of discrimination, it should assume that the complaint could give rise to a claim of retaliation, regardless of its merit. Therefore, when deciding whether to discipline or discharge an employee who has recently complained of discrimination, employers should ensure their documentation supports the reasons for the discipline or discharge, and consult with legal counsel sensitive to retaliation concerns. An employer may not always be able to prevent retaliation claims, but the proper precautions can significantly reduce the risk of liability from these claims.

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