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Win the Battle but Lose the War: The Bane of Retaliation Claims

By Dinita L. James

Most employers are familiar with their duty to avoid retaliating against employees who complain about discrimination or harassment. Some employers, however, may not be aware of less familiar, but no less important, retaliation prohibitions outside of the employment discrimination context, sometimes referred to as "whistleblower claims." Indeed, many federal statutes protect employees who complain of conduct the employees believe to be unlawful from retaliation by their employers. Twenty-two federal statutes have whistleblower protection provisions, and that number is on the rise. Congress has added 10 new whistleblower statutes since 2005, and half of them have been enacted since 2009. As an example of the increased focus on this issue, the department within the Occupational Safety and Health Administration that handles complaints of retaliation under an alphabet soup of federal statutes - from AHERA (Asbestos Hazard Emergency Response Act) to TSCA (Toxic Substances Control Act) - was recently elevated to an agency level. It is called the Directorate of Whistleblower Protection Programs, and it is supported by a brand-new Whistleblower Protection Advisory Committee.

The need for employers to be aware of the various anti-retaliation provisions, both within and outside of the employment discrimination context, is increasing, as are the number of retaliation claims themselves. Since 2005, the number of retaliation claims filed with the EEOC has increased 70%. In May 2013, the Supreme Court granted certiorari on the issue of whether the retaliation provision that protects "whistleblowers" under the Sarbanes-Oxley Act extends to contractors and subcontractors of publicly traded companies.

These developments should prompt employers to redouble their commitment to anti-retaliation policies and to train managers on the importance of a corporate culture where employees are free to express their concerns without fear of retaliation. Because not only are retaliation complaints on the rise, but as employers are reminded on a consistent basis, they can be among the thornier issues to deal with both before and during litigation.

The most recent example of this comes from the U.S. Court of Appeals for the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), which in April 2013 decided *Westendorf v. West Coast Contractors of Nevada, Inc.*, 712 F.3d 417 (Apr. 1, 2013). Jennifer Westendorf worked for six months as an assistant to project manager Dan Joslyn at West Coast Contractors. In her first month on the job, Mr. Joslyn referred to Ms. Westendorf's duties as "girlie work." Mr. Joslyn apologized immediately for the comment, but someone - not Ms. Westendorf - reported it to the company president, who reprimanded Mr. Joslyn. Mr. Joslyn then confronted Ms. Westendorf, using profanity and saying he had "been through this ... before" and "it's just not happening" again.

Ms. Westendorf's job duties required her to cross paths with co-worker Patrick Ellis, who made some explicit and undeniably offensive comments whenever he was around Ms. Westendorf. Mr. Joslyn himself witnessed some offensive comments by Mr. Ellis, and even participated in one of them. Each time Mr. Ellis made an offensive comment, Ms. Westendorf demanded that he stop. Mr. Joslyn either smiled or chuckled when he was present, taking no other steps to remedy the situation.

Ms. Westendorf eventually took her complaints to the company president, who verbally reprimanded Mr. Joslyn and told him his job was on the line if he did not get Mr. Ellis to stop the offensive conduct immediately. The president cautioned Mr. Joslyn to speak with Ms. Westendorf only about work-related matters. The company president then left for vacation.

Ms. Westendorf complained that Mr. Joslyn subsequently started "nit-picking" her job performance and cursed at and belittled her in front of clients. The two also had a heated exchange regarding comments Ms. Westendorf made about Mr. Joslyn in front of a subcontractor, and in that argument Mr. Joslyn used profanity towards Ms. Westendorf. Ms. Westendorf reported the argument to the company president's assistant and stated that she no longer wanted to work with either Mr. Joslyn or Mr. Ellis.

The company president investigated the incident upon his return from vacation, but Ms. Westendorf did not respond to his inquiries about what she said to the subcontractor. Their discussion ultimately

escalated and ended with the company president telling Ms. Westendorf that she clearly did not get along with Mr. Joslyn and that it would be best if she gathered her things and left. Ms. Westendorf was escorted from the building. Ms. Westendorf then filed a lawsuit alleging sexual harassment and retaliation.

The trial court granted summary judgment for the employer and dismissed the case. On appeal, the Ninth Circuit affirmed the dismissal of the harassment claim but reversed the dismissal of the retaliation claim, holding that it had to be decided by a jury. The appellate court noted that while the company president claimed any action towards Ms. Westendorf was based on her speaking out of turn to a subcontractor, there was enough evidence for a jury to conclude that her complaints about the sexually charged comments from Mr. Joslyn and Mr. Ellis were the true motivation for her firing, especially given how close they were in time to her firing. Now, despite having won in the trial court and won on the harassment claim on appeal, the employer now faces the expensive and risky prospect of trying the retaliation claim in front of a jury.

This case is just the latest example of how important it is for employers to treat any kind of employee complaint of misconduct or wrongdoing carefully. Although Ms. Westendorf's complaints were made in the harassment context, which is perhaps the more "familiar" context for retaliation, these lessons translate to the non-discrimination and non-harassment context as well. The increase in protections for employees reporting what they believe to be wrongdoing is undeniable, from the increase in federal statutes noted above to the upcoming Supreme Court case. In addition, states may have their own statutes prohibiting retaliation for reports of wrongdoing in additional contexts.

Notably absent from the facts of Ms. Westendorf's half-year employment at West Coast was any involvement by human resource professionals or legal counsel. While not all retaliation claims can be avoided, training and vigilant enforcement of anti-retaliation policies on the front end, and guidance from professionals when responding to employee complaints that do arise, are the best practices to reduce the risk of retaliation claims. This holds true even outside the employment context, as recent events demonstrate. Employers should approach employee complaints of alleged wrongdoing with caution and, if in doubt whether an anti-retaliation provision applies, whether or not in the employment context, contact their legal counsel.

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