

Retaliation: Don't Get Mad, Don't Get Even

*Ted Gentry, Member
Wyche Burgess Freeman & Parham, P.A.*

As heard on "South Carolina Business Review" with Mike Switzer
Broadcast April 24, 2008

Many employers are familiar with the traditional disputes that can arise with their employees – in areas like worker's compensation and anti-discrimination law. But many don't know about one of the fastest-growing groups of claims – suits alleging unlawful retaliation.

What is unlawful retaliation?

It's not the kind of retaliation you'd see on *The Sopranos*. A retaliation claim is nothing more than an assertion by an employee that he or she has been punished for asserting a legal right. That's why retaliation claims often catch employers off guard. In a retaliation lawsuit, the employee is not saying "You discriminated against me" or "You didn't pay me minimum wage." Instead, the employee is saying "I had a legal right to accuse you of discrimination, and after I accused you, you punished me for asserting that right."

Could an employer be liable for retaliation against an employee, even though the employer didn't do anything wrong initially?

A retaliation claim is an opportunity for an employer to snatch defeat from the jaws of victory. Imagine one of your employees accuses your company of discrimination, and that you spend a bunch of time and money defending against that claim, and ultimately win it. It's human nature to be hurt, and angry, and to feel as though the folks who accused your company of wrongdoing are disloyal. So maybe you pass over that employee when you give out raises, and you decide not to give one of the key witnesses a promotion. You've just engaged in unlawful retaliation, even though you won the initial case accusing you of discrimination.

Does that mean laws against retaliation aren't limited to retaliation against the plaintiff?

Many retaliation statutes extend beyond the employee who has made a formal claim. They protect employees who report allegedly illegal conduct, employees who participate in an investigation, and those who are witnesses in a hearing.

Where will an employer find a rule against retaliation?

Many employee protection statutes include anti-retaliation provisions: the federal wage and hour laws, ERISA, the Family and Medical Leave Act, OSHA, the various federal discrimination laws, worker's compensation – even Sarbanes Oxley.

We know Sarbanes-Oxley has added accounting and auditing requirements – does it also change employment law?

That portion of the Act has received less attention. But Sarbanes-Oxley has a very broad set of protections for “whistleblowers” – that is, employees who report certain kinds of corporate wrongdoing, either to regulatory or law enforcement officials, or to corporate supervisors with appropriate authority. In my opinion, Congress added these whistleblower provisions as an attempt to enlist employees in policing corporate accountability. There's no way that the government can (or should) effectively oversee the millions of corporate financial transactions that take place every day. So Congress has tried to encourage employees to report wrongdoing by prohibiting retaliation for those reports. (And by the way, the procedures for investigating and trying Sarbanes-Oxley retaliation claims are fiendishly complex – even by the standards of the legal profession.)

Does Sarbanes-Oxley apply to all employers?

Sarbanes-Oxley applies only to publicly traded companies – although there is one broad provision that prohibits retaliation for reporting a federal offense to law enforcement that isn't limited to public companies. And while the law is still developing, I think the best reading of the statute is that the whistleblower provision prohibits retaliation only in certain categories of employee reports – in essence, those that relate to something that shareholders would find material.

But that's not the end of the story. Changes in one area of the law can change the way lawyers and judges think about other areas. The trend toward increased protection for employees who report wrongdoing – even if the employee is mistaken but acting in good faith – is probably, in the long run, going to work its way into our general approach to employment law.

What's the bottom line for an employer?

You need to be very careful in dealing with an employee who has claimed that the company has committed any kind of wrongdoing – either financial wrongdoing, or some sort of employment law violation. Even if that employee was mistaken, if he or she was acting in reasonable good faith, you could find yourself liable for retaliation if you take an adverse action that is connected to the report. If you find yourself in a situation like this, it could be a good time to consult a lawyer. Remember, don't get mad, and don't get even.

If you have any questions related to this subject, do not hesitate to contact any member of Wyche's Employment team:

J. Theodore Gentry	864.242.8270	tgentry@wyche.com
Mark W. Bakker	864.242.8299	mbakker@wyche.com
Jo Watson Hackl	864.242.8225	jhackl@wyche.com
John C. Moylan III	803.254.6542	jmoylan@wyche.com
Patricia Standaert Ravenhorst	864.242.8375	pravenhorst@wyche.com

This memorandum is provided by The Wyche Law Firm for educational and informational purposes only and is not intended and should not be construed as legal advice. The rules are the subject of ongoing interpretations and clarification. We will be pleased to discuss with you in detail how the rules apply to a particular retaliation issue. Please contact any of the above attorneys or your primary contact within our firm for more information.