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Watch Out for Growth of Retaliation Claims

By: Mike DeCamps. ***This was posted Thursday, July 15th, 2010***

Employers spend thousands of dollars training management on how to avoid discrimination and other employment claims. Yet retaliation is often overlooked because it is an employment claim that essentially comes through the back door. For example, an employee who claims that an employer has discriminated against them may have no foundation at all for a discrimination complaint. Managers are often well trained on avoiding discrimination and other employment claims but if an employee can prove that the employer took retaliatory action because the employee brought an unfounded discrimination claim, the employer has a real problem.

Despite its increasing swing toward conservatism, in recent years, the Supreme Court, has generally looked favorably on plaintiffs with regard to retaliation claims. The court fashioned a generally plaintiff favorable standard in Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) when it held that an employer can be liable for retaliation under Title VII for a materially adverse action that would simply dissuade a reasonable employee from filing or assisting a discrimination complaint. It also reached an employee favorable result in the 2009 case, Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn. 555 U.S. ____, 129 S.Ct. 846 (2009). There an employee had spoken out against a supervisor in an internal sexual harassment investigation in which the employer had required the employee to participate. When the employee was subsequently dismissed by the employer, the Court concluded that the employee was the victim of retaliation because she had "opposed" an unlawful employment practice even though the employee had participated in the internal investigation only after being required to do so.

Now comes the pièce de résistance of retaliation law to be heard by the 2010-11 Supreme Court. In an appeal from the Sixth Circuit, the Court will be asked for the first time to hold that an individual employee who has not personally engaged in any protected activity may still be the victim of a retaliation claim. In Thompson v. North American Stainless, LP, Eric Thompson claims he was retaliated against when his employer fired him approximately three weeks after it learned that his fiancé, a co-employee, had filed a sex discrimination charge against the company. While North American Stainless alleged that Thompson was fired for performance reasons, he contended that the employer came after him because it was mad about the claim filed by his fiancé.

Interestingly, Thompson was successful before a panel of three judges in the Sixth Circuit, but when the case was heard by the full court, it ruled against Thompson. The Justice Department even recommended that the

Supreme Court refuse to grant Thompson's appeal, but the Court has agreed to hear it. A ruling in favor of Thompson would and could send shivers down the spine of management attorneys and yet it could happen. Think about it. The employee did not file the discrimination claim nor does that claim have anything to do with conduct taken against the employee. Thompson claims retaliation merely based on his relationship with another employee who did engage in protected activity. The Court's ruling in Crawford could play a role in this case, however, because Thompson allegedly assisted his fiancé in filing her complaint. Whether such action constitutes "opposition" and whether the Court seizes on this for an expansive ruling remains to be seen, but this case will be watched closely by employers everywhere, including clients of our Virginia employment lawyers.

How can you ensure that an action is not construed by an employee as retaliation?