RETALIATION AND WHISTLEBLOWER PROTECTION
THE MUDDY PITS FOR EMPLOYERS

By:

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In today's employment world there are numerous federal or state statutes prohibiting one form of discrimination or another. Any management official worth his/her salt is keenly aware of these laws, understands the consequences, and is educated on the policies and procedures necessary to avoid violation. The pits many managers inadvertently fall into are created by provisions within those statutes/laws that not only prohibit discrimination, but also protect an employee for complaining about his/her reasonable belief that discrimination has occurred or is occurring – even if there was/is no discrimination in the first place.

Retaliation or whistleblower protection may arise from various sources, both federal and state. Some are statutory while some are considered common law – i.e. created by a judicial decision. Both are pits where an employer can get muddy due to the difficult burden of defending a retaliation/whistleblower claim in litigation.[1]

The most commonly known federal laws prohibiting an employer from taking an adverse employment action against an employee based on the employee reporting or complaining about discrimination or other violation include:

- Title VII of the Civil Rights Act of 1964 (race, sex, religion, national origin, and harassment);
- Age Discrimination in Employment Act (age – 40 or over);
- Americans with Disabilities Act (disability);
- 42 U.S.C. §1981 (race only);
- Occupational Safety & Health Act (workplace safety/health); and
- Fair Labor Standards Act (wage & hour).

[1] A whistleblower claim is based on an adverse action taken in response to an employee reporting or complaining about wrongdoing. A retaliation claim may be similar in that the anti-retaliation provision has a protection element for reporting or complaining about discrimination or other violation. Anti-retaliation provisions also have another protective element – often referred to as the participation clause.

In Mississippi, the choices are fewer for employees, but equally dangerous for the employer:

- McArn Exception (reporting illegal conduct)
- Miss. Code Ann. §25-9-173 (testifying or providing information to state investigative agency – public employers only).

A. Basic Application of the Federal Laws

As mentioned in footnote 1, a retaliation claim may arise when an employee either reports/complains about discriminatory treatment or "participates" in a formal or informal investigative proceeding regarding a claim or complaint about discriminatory treatment. A whistleblower claim is just that – the employee believes he/she received an adverse employment action due to his/her reporting wrongful conduct or other violation.

Although arising from different sources, retaliation/whistleblower claims under the various federal laws are reviewed under the same or very similar standard by the courts when determining whether a violation has occurred.

The typical retaliation/whistleblower law requires the following proof for the claim to be successful against an employer:

1. A report/complaint of discrimination or other prohibited wrongdoing by employee;
2. An adverse employment decision by the employer impacting the employee;
3. Employer had knowledge of the protected activity; and
4. The adverse decision would not have been made "but-for" the employee's report/complaint.

➢ ***What does the report/complaint have to be about?***

Just because an employee complains about something at work does not necessarily mean he/she is protected by the federal anti-retaliation laws. In other words, unless the employee's reporting or complaining concerns a protected activity, then he/she is just a complainer and not protected.

If an employee complains about how he/she or someone else is being treated and asserts he/she believes it is because of his/her race, sex, religion, age, or disability – then his/her doing so is protected from retaliation under Title VII, Section 1981, the ADEA, or the ADA, whichever is applicable to the subject of the complaint. The same is true if the employee complains about or reports a condition in the workplace that creates a safety concern or potential hazard. This protection would fall under OSHA.

- ***Who does the report/complaint have to be submitted to?***

The employee is not required to file a formal complaint to a governmental agency (like the EEOC or OSHA) to assert protection of the applicable anti-retaliation laws – although that certainly is protected. An employee may simply express his/her belief, either verbally or in writing, of discriminatory treatment or animus to a manager, supervisor or other management official with the employer to avail himself/herself of the protected shield. It is important for an employee alleging retaliation to show that his/her employer had knowledge of his/her protected complaints. Otherwise, he/she will not be able to show that the employer acted on such knowledge – thereby, unable to prove the employer retaliated based on such complaints. Therefore, just shop talk among co-workers means nothing if there is no proof that the decision-maker had knowledge of the complaint at the time of the adverse employment decision.

- ***What is an "adverse employment decision" impacting the employee?***

For there to be a viable claim, the employment decision impacting an otherwise protected employee must "materially" effect a term, condition or privilege of the employee's employment. Examples of potential adverse employment decisions include:

- Termination;
- Demotion;
- Denial of promotion;
- Suspension;
- Pay cut;
- Reduced hours; or
- Assignment/transfer to different, more difficult tasks.

Essential, as a general rule, a decision effects a term, condition or privilege of employment if the employee suffers an economic impact as a result of the decision. However, any evidence tending to suggest that the employee is being treated differently (harsher) than similar situated employees may suffice and the employer must walk carefully around that pit.

- ***Work conduct is not required***

The applicable statutes prohibit discrimination/retaliation with respect the terms, conditions or status "of employment." At one time, consequently, there was a debated question as to whether the retaliatory conduct must occur at work. The United States Supreme Court concluded that events occurring outside the workplace could support a claim for illegal retaliation. The justices reasoned that while Title VII of the Civil Rights Act prohibits discrimination with regard to the terms and conditions of employment, the anti-retaliation provision in the statute simply bars employers from "discriminating against" an employee for objecting to illegal bias. Noting the failure to include similar limiting language in the retaliation provision, the justices concluded that the retaliation provision was <u>not</u> limited to workplace conduct.

- ***Timing is Critical***

One of the more litigated areas in proving a casual connection between an employee's protected activity and an employer's alleged adverse action is assessing the weight to assign "temporal proximity." Suffice to say that the closer in time the adverse decision is to the protected activity engaged in by the employee, the more difficult it will be for the employer to succed on a dispositive motion. However, it is important to note that, although the closeness in proximity may be probative of a causal connection, most courts have held that temporal proximity alone is not enough to support an inference of retaliatory discrimination when there is no other compelling evidence.

- ***The Protection is <u>not</u> Absolute!***

Just because an employee has complained about discrimination or other prohibited wrongdoing does not mean he/she is to be provided preferential treatment for the remainder of his/her employment. Many employees mistakely believe they cannot be fired or otherwise disciplined "*for any reason*" once he/she has either complained or participated in an investigation of a complaint regarding discrimination or other prohibited wrongdoing. To the contrary, an employer is free to enforce its rules as they have been enforced in the past. Should an

otherwise protected employee violate an employer policy, he/she may be disciplined accordingly. In other words, where there is a legitimate, non-retaliatory reason for the decision, the employee is subject to the consequences regardless of his/her protected activity.

B. Basic Application of Mississippi Laws

There are essential two retaliation pits to avoid under Mississippi law. The first is the judicially created exception to the "at-will" doctrine first enunciated in *McArn v. Bruce-Allied Terminix* by the Mississippi Supreme Court in 1992. The second, at least for the public employer, is statutory and found at Miss. Code Ann. §25-9-173, enacted by the Mississippi Legislature. A quick glance at these should alert any employer that the problems generated by these laws are as much a risk for the employer as that posed by the federal laws.

➢ The McArn Exception

In 1992, the Mississippi Supreme Court determined there should be a public policy exception to the long established "at-will" doctrine in Mississippi. In *McArn v. Bruce-Allied Terminix*, the Court opined that an "at-will" employee would have a cause of action for wrongful discharge if he/she is terminated for (a) refusing to commit an illegal act, or (b) reporting an illegal act. The *McArn* claim essentially is a judicially created anti-retaliation law. A bad trial result can be costly. A successful plaintiff can recover back wages, consequential damages, punitive damages, and costs.

In order for a terminated employee to be successful on a McArn claim, he/she has to prove that:

- Employee refused to perform an illegal act or reported an illegal act;
- Employer had knowledge of the refusal or report;
- Employee would not have been terminated "but for" his/her refusal or report.

What kind of "illegal act" must be involved?

Since *McArn* was decided, several court decisions have limited the application of the exception. The first was to identify that the "illegal act" must involve conduct that is subject to <u>criminal</u> penalties as opposed to mere <u>civil</u> penalties. Another decision stated that the "illegal conduct" must involve or be

related to the employer's business – as opposed to illegal activity or conduct of another that is simply performed on the employer's premises. If the employee is terminated for committing an illegal act, then he/she is not protected – yes, at least one employee attempted to assert a claim under *McArn* after being fired when he was caught engaging in illegal conduct at work.

Who is Liable?

Some trials under *McArn* have resulted in verdicts by a jury against the employer in excess of $1,000,000. Therefore, who can be held liable is an important question for managers or other supervisory personnel. Fortunately, the Mississippi Supreme Court has held that a supervisor or individual decision-maker is not personally liable for damages under the *McArn* cause of action. In *DeCarlo v. Bonus Stores, Inc.*, the Court opined that only the employer can be held liable for damages in a wrongful discharge claim brought under the exception created in *McArn*.

- **Miss. Code Ann. §25-9-173**

Mississippi has few statutes addressing the employment relationship – especially for private employer – but this one is important one to be aware of if you're a decision-maker for a public employer. According to this statute, an agency of the state or political subdivision of the state may not adversely affect the compensation or employment status of any public employee because the employee testified or provided information to a state investigative agency.

There is only one reported decision known to involve a claim under this particular section of the Mississippi Code. The case was *Blackwell v. Mississippi Board of Animal Health* in 2001. In Blackwell, the plaintiff alleged she was harassed and denied continued employment because of her participation and having provided information in a PEER Review that ultimately resulted in a critical report being issued about the employer. However, since the argument was raised by the plaintiff for the first time on appeal, the Court declined to rule on the claim and found it to be procedurally barred.

What we do know from the statutory language is that the prohibition extends to any kind of reprisal in connection with the terms and conditions of employment. This includes unwarranted or unsubstantiated reprimands or performance evaluations, reduction in pay, denial of promotion, suspension, discharge and denial of employment.

Based on the statutory reading, you could be called on to justify any employment action you take that involves an employee who has, in any way, been connected with an investigation by or report to an investigative body of the state, including having to prove that your reprimand or performance evaluation of an employee was based on legitimate grounds.

C. Avoiding the Pit

Avoiding a potential retaliation/whistleblower claim is much easier than defending one in court. Because most adverse decisions are subjective - at least when it comes to observations of performance – courts are often reluctant to grant summary judgment in retaliation claims since they do not want to issue a determination based on nothing more than a subjective motive. Consequently, it will cost the employer a good deal of money in defense fees and a great deal of aggravation just to prove it did nothing wrong.

Therefore, avoidance is critical. Here are some suggestions to assist in staying out of the muddy pit:

Step One: Take control of decision-making. Once there is recognition that protected activity may have occurred, partner Human Resources and Management (assisted by Legal as needed) to develop an individualized plan to minimize risks. Identify the "team."

Step Two: Create the proper working environment. Separate in a nondiscriminatory way the complaining employee and the alleged discriminator/harasser.

Step Three: Cleanse the decision-making loop. When possible, take the alleged discriminator/harasser out of the decisional loop for any action that could be deemed an adverse employment action.

Step Four: Create a direct line of communication for the complaining party to voice concerns. Direct the complaining party to forward all concerns to Human Resources (or alternatively to a designated member of the decisional "team"). This minimizes the possibility of the complaining employee stating: "Well, I told my supervisor and he/she did nothing about it."

Step Five: Fairly investigate all concerns – avoid subjectivity or evaluation in a vacuum. Your job is not to disprove the claim. Your job is to get to the facts, evaluate them, and take appropriate action. The quality and integrity

of the investigation is the foundation of the Company's defense should litigation ensue.

Step Six: Monitor. Affirmatively and periodically reach out to the employee with the questions: "How are you doing? and Is there anything to report?" Then prepare a memorandum to the file memorializing the question and answer.

Step Seven: Take control of the message. This is the most important step. The Company that takes control of the message ensures that the documentary evidence that the EEOC, judge, and jury evaluate will faithfully reflect the integrity and sensitivity with which the Company responded to the employee's concern.

There are three components to controlling the message:

1) Control the message to the complaining employee, and to the complaining employee's file.

   Written correspondence should reflect the Company's determination to get to the facts and to remediate the concern.

2) Control the internal message.

   It is especially important that those in the complaining employee's chain of command refrain from independently crafted voice and written communications <u>to and about</u> the employee.

   Don't let victory (in the form of a no-cause finding by the EEOC, a defense summary judgment, or a defense verdict) be taken away by stupid, unsupervised communications, especially email communications. All communications should be crated by the "team."

   Do <u>not</u> pass up the opportunity to create a document that explains the situation from the employer's perspective and that reflects sensitivity and integrity.

3) Control the message externally.

A great defense can be totally undercut by a poorly conceived response to an application for unemployment benefits, or a poorly conceived EEOC position statement.

Every communication to or about the complaining employee must be coordinated. Not only must the left hand know what the right is doing, one of the hands needs to be in charge of the message.

Step Eight: Provide feedback to the complaining employee. Again, control the message.

Step Ten: Take a deep breath. In the immediate aftermath of a complaint or expression of concern, pause and reflect before implementing any decision that could be construed as an adverse employment action.

A paper trail that accurately reflects that the company has given the employee the benefit of the doubt will contribute mightily to a positive result.

Beware the problem of "temporal proximity." The EEOC, judge, and jury are more likely to infer retaliation if an adverse action is proximate in time to an employee's participation in "protected activity."

D. Conclusion

No "avoidance" list can guarantee a risk-proof outcome. Often, an employer's best decision is a choice between the lesser of two evils. But a process that takes control of decision-making and communication and which accurately reflects the employer's commitment to basic fairness will more often than not protect the employer for one simple reason: a process that is fair and is fairly documented is more likely to be perceived as fair – by employees, the EEOC, judges, and juries.