UNDERSTANDING AND AVOIDING RETALIATION CLAIMS

by

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I. PARTICIPATION AND OPPOSITION CLAUSES OF TITLE VII

A. Federal Law

In addition to forbidding discrimination against protected class individuals due to their protected class status, § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) makes it unlawful to discriminate against an employee or a job applicant due to the fact that the individual has **opposed** any practice engaged in by the employer alleged to be unlawful or because the employer or job applicant has filed a charge, testified, assisted, or **participated** in any manner in an investigation, proceeding, or hearing under Title VII.

Consequently, this section of Title VII contains two provisions: the Opposition Clause and the Participation Clause.

B. Opposition Clause

The Opposition Clause clearly states that anyone who threatens to file a Title VII charge of discrimination against an employer or opposes any practice of the employer believed to be unlawful is protected by Title VII. Even if the employee is wrong and no unlawful act was in fact committed by the employer, as long as the employee made the allegation in **good faith** and the allegation was based upon a **reasonable belief** that the employer had violated Title VII, the individual who threatened to file the charge of discrimination is protected.

C. Participation Clause

The Participation Clause, on the other hand, provides the employee with absolute protection from any retaliatory acts by an employer if the individual actually does file a charge with the EEOC or participates in an EEOC investigation in any way. Even if the employee *knows* that the employer has not committed an unlawful act and files a charge against the employer anyway, the employee is still protected.

As a result, no "good faith" or "reasonable belief" requirements exist under the Participation Clause of § 704(a), unlike the Opposition Clause.

The reason for granting such absolute protection under the participation clause is based upon a public policy rationale: Congress wants people to feel safe in filing claims and participating in EEOC investigations. When an employee feels that an employer has committed an unlawful act, Congress wanted such persons to feel completely uninhibited in bringing such actions to the attention of the EEOC and in cooperating with the EEOC.

It is important to note that § 623(d) of the ADEA also prohibits retaliation by employers. Additionally, the Civil Rights Act of 1991 suggests that a retaliation claim is also available under § 1981 claims (race).

II. NEW RETALIATION STANDARD

In Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 at 2412 (2006), Sheila White applied for a job as a forklift operator with Burlington Northern & Santa Fe Railway Company in its Maintenance of Way Department in Memphis, Tennessee. Burlington hired White for the job. White was the only female forklift operator in this department.

After a few months on the job, White filed a complaint of sexual harassment against her supervisor, Bill Joiner. The company investigated and determined that Joiner had in fact sexually harassed White. Joiner was suspended without pay for 10 days and was required to go to sexual and illegal harassment training.

However, as a result of its investigation, Burlington discovered that there were a great many complaints about White working in the forklift position. The forklift position was much cleaner and physically less demanding than the other jobs in the department. Other employees complained that a less senior person should not have been given this job.

As a result, Burlington removed White from the forklift position. White was replaced by a more senior male employee. Burlington did not change White's pay or benefits when she was transferred. However, White's new job was much dirtier and much more physically demanding than that of a forklift operator.

White filed a charge of retaliation with the Equal Employment Opportunity Commission. Afterwards, White filed this charge with the EEOC, she got into a dispute with her supervisor, and she was suspended without pay for the offense of insubordination, pending Burlington's investigation.

After Burlington investigated White's suspension for insubordination, management determined that White had not been insubordinate. Burlington therefore reinstated White with back pay, which equaled 37 days. White then filed suit against Burlington for retaliation under Title VII. The trial court held for Burlington.

White then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held for White.

Burlington appealed to the United States Supreme Court. The Court held for White.

Specifically, the U.S. Supreme Court held that:

"The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."

The Supreme Court then went onto hold in Burlington that a plaintiff must demonstrate that he suffered a "materially adverse" retaliatory action, which it defined as one that:

"**well might have dissuaded a reasonable worker from making or supporting a charge of discrimination**."

In this case, however, even though White's pay and benefits were not changed, she was transferred to a job that was harder, dirtier and had less prestige. Ever since White started working at Burlington there was great resentment amongst the other workers that she received the forklift position. It was only **after** White filed her sexual harassment complaint that Burlington took action and removed White from the forklift position.

Also, suspending White without pay for 37 days was no small matter. It is clear that White was suspended because she was seen as a "trouble-maker" for filing a charge with the EEOC. Even though Burlington later recognized the error and reinstated White with back pay, the harm had been done. White had to sit at home for over one month without pay and wondering whether or not she would still have a job.

Therefore, the Court held that Burlington had in fact retaliated against White for filing a sexual harassment complaint and a charge of illegal discrimination with the EEOC.

III. PLAINTIFFS MUST PROVE THE "SOLE REASON" FOR ADVERSE ACTION IN TITLE VII RETALIATION CASES

In University of Texas v. Nassar, 133 S.Ct. 2517 (2013) Naiel Nassar, a physician of Middle Eastern descent, was a faculty member at the University of Texas, as well as a University of Texas Southwestern Medical Center hospital staff physician.

In 2004, Dr. Beth Levine interviewed for the University's Chief of Infectious Disease Medicine position. Before accepting the position, Levine interviewed the people whom she would be supervising. While she met with other subordinates for 15 to 20 minutes, she met with Nassar for an hour-and-a-half.

In this position, Levine became Nassar's ultimate (although not direct) superior. Once she was hired, she questioned Phillip Keiser, Nassar's immediate superior and her subordinate, about Nassar's productivity and work ethic. According to Keiser, Levine "never seemed to [be] satisf[ied]" with his assurances that Nassar worked harder than others, rather than not as hard.

Nassar complained several times to Levine's supervisor, Dr. Gregory Fitz, the University's Chair of Internal Medicine and Levine's supervisor, about this unwarranted scrutiny, which included unfair questions about his billing practices.

The next year, Levine objected to the hiring of another Middle Eastern doctor, stating that "**Middle Easterners are lazy**." When this physician was hired over her objection, she complained that the hospital had "**hired another one**."

In order to avoid Levine's hostility, Nassar sought to leave the university. So, Nassar tried to arrange to continue working at the Hospital without also being on the University's faculty. After preliminary negotiations with the Hospital suggested this might be possible, Nassar resigned his teaching post in July 2006 and sent a letter to Dr. Fitz (among others), in which he stated that the reason for his departure was harassment by Levine. **That harassment, he asserted, "`stems from ... religious, racial and cultural bias against Arabs and Muslims**.'"

After reading that letter, Dr. Fitz expressed consternation at respondent's accusations, saying that Levine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated."

Meanwhile, the Hospital had offered Nassar a job as a staff physician, as it had said it would. When Dr. Fitz learned of the offer the Hospital had made to Nassar, he protested. Dr. Fitz claimed that the offer from the Hospital that the offer made to Nassar was inconsistent with the affiliation agreement's requiring that all staff physicians also be members of the University faculty. The Hospital then withdrew its offer.

Nassar filed this Title VII suit. He alleged two discrete violations of Title VII. The first was a status-based discrimination claim under § 2000e-2(a).

First, Nassar alleged that Dr. Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University.

Second, Nassar claimed was that Dr. Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Dr. Levine's harassment.

At trial, the jury was instructed that Nassar:

> "[did] not have to prove that retaliation was [UTSW's] only motive, but he [had to] prove that [UTSW] ***acted at least*** in part to retaliate."

The university objected and argued on appeal that Nassar should have been forced to prove retaliation was the **sole** reason the hospital withdrew its offer of the staff physician.

The jury found for Nassar on both claims. It awarded him over $400,000 in backpay and more than $3 million in compensatory damages. The District Court later reduced the compensatory damages award to $300,000.

The employer appealed. The 5th Circuit overruled the lower court's decision regarding the constructive discharge claim. However, it affirmed the retaliation claim.

The 5th Circuit specifically found that Nassar only had to show that retaliation was ***a*** motivating factor for the adverse employment action he received … not that it was ***the*** motivating factor for the retaliation Nassar suffered … which was the Hospital's decision to rescind his offer of employment.

On appeal to the U.S. Supreme Court, the Court had to decide how to proceed in cases when there is direct evidence of an illegal motive for making an employment decision, but there is also evidence of at least one legal motive. Therefore, the Nassar case is about whether the so-called "mixed-motive" proof structure is available for retaliation claims, or only for underlying claims of discrimination

This concept of a "mixed motive" standard of proof was introduced by the Court in its 1989 ruling in Price Waterhouse v. Hopkins.

In Price Waterhouse, a majority of the Court agreed that a plaintiff could prove discrimination by showing that the employer's illegal motive was a ***substantial motivating factor*** in making an adverse employment decision. However, the Court also ruled an employer could ***avoid*** liability if it could prove that, even though it did taking the person's protected class, such as race, religion, sex, etc. into account, it still would have made the same decision anyway.

Congress then passed the Civil Rights Act of 1991, which overruled the Price Waterhouse decision. While this Act codified the Price Waterhouse "mixed motive" proof structure, it eliminated the Court's holding that an employer could avoid liability if it could prove that it still would have made the same decision anyway.

Under the new Act, the plaintiff has the burden to prove that discrimination was "***a*** motivating factor" for the adverse decision suffered by the plaintiff. That alone results in a finding of employer liability.

However, if the employer can then prove that it would have made the same decision even apart from the discrimination, the employer can escape money damages, but may still be on the hook for attorneys' fees and injunctive relief.

The more specific issue in Nassar is whether the Civil Rights Act of 1991 applies only to "discrimination" cases or if it also applies to "retaliation" cases as well.

In Nassar, the U.S. Supreme Court found that the Price Waterhouse decision and the Civil Rights Act of 1991 were ***not controlling.***

Instead, the Court held that Title VII defines an unlawful employment practice as discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin." (Section 2000e-2(a)) In a separate provision, it provides that it is also an unlawful employment practice for an employer to discriminate "**because**" an employee has opposed or participated in an investigation of unlawful employment practices. (Section 2000e-3(a)).

The Court held that without a more detailed instruction, the phrase "because of" in a statute implies "**but-for**" causation, which means the adverse employment action would not have occurred but for the illegal retaliation.

Therefore, the Court held that in order to prevail in Title VII retaliation claims, plaintiffs must prove that the employer's illegal conduct was the "sole cause" of adverse action.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

While this case is a big break for employers who find themselves in Title VII retaliation claims, it is in direct conflict with the standard used to prove illegal harassment or illegal discrimination under Title VII.

Employers should make sure to train their people in illegal harassment, discrimination and retaliation in order to avoid such lawsuits in the first place.

IV. RETALIATION CAN BE INFERRED

In Crawford v. Chipotle Mexican Grill, Inc., No. 18-3360 (6th Cir. May 28, 2019), In February 2012, Chipotle hired Alashae Crawford, who is African American, as a crew member at one of its southwestern Ohio restaurants. Shortly after, Jeysie Torres, who is Hispanic, became the restaurant's general manager. Although Crawford's performance evaluations reflected room for improvement, Torres took interest in her career and encouraged her to work toward a promotion. Just over a year after Crawford's hiring, Torres promoted her to the lowest supervisor position. Torres eventually moved to another Chipotle restaurant to help improve its performance; Crawford followed him to work at that request at Torres' request. Torres again quickly promoted Crawford.

Torres and Crawford had occasional disagreements at the new restaurant. Crawford confronted Torres several times about his perceived favoritism toward Hispanic employees; Torres would reply that Crawford was only sticking up for African-American crew members because she is black. Despite these disagreements, however, Torres and Crawford had a good working relationship.

In early 2014, Philip Shelton and several other African American crew members came to Crawford with concerns about their timesheets, which had been altered to reduce their hours worked. Crawford confronted Torres and the assistant manager Osbaldo Amaya, who is Hispanic, about the time-shaving. The two admitted they had altered the timesheets, claiming they did so under pressure to improve the restaurant's performance.

In February 2014, Shelton called Chipotle's "Respectful Workplace" hotline about the time-shaving. Crawford overheard Shelton complaining during that call that Torres and Amaya "ha[d] been showing favoritism towards other Hispanic workers that work the same position as me." Chipotle's regional supervisor, Melvin Henriquez, investigated Shelton's complaint. He concluded that Shelton often forgot to clock in and out, and that the managers (including Crawford) had sometimes inadvertently shorted Shelton later when correcting his timesheets.

In early March 2014, Henriquez assigned Sam Revis, an experienced manager, to advise Torres on improving the restaurant's performance. Revis determined that the restaurant was in disarray; the employees did not follow food safety protocols, deliver acceptable customer service, or maintain sufficient cleanliness. Revis advised Torres to make personnel changes to increase productivity, but never specifically recommended that Torres terminate Crawford.

Meanwhile, "[i]n March of 2014, a short time before [Crawford's] termination, Shelton showed [her] his paycheck," which indicated that he had not received his promised back pay from the time-shaving incident. Crawford "approached" Torres about the issue because she "believed that Torres was purposely interfering with Shelton getting his back pay." Crawford told Torres "that he was discriminating against Shelton, that he needed to stop harassing Shelton," and "that he needed to pay Shelton for the hours that Mr. Amaya had taken from Shelton." Torres replied that "the only reason [Crawford] was defending Shelton was because [she is] black."

Although Torres had previously been supportive of Crawford's career, their relationship changed after this conversation. Torres held a meeting with Amaya and Crawford in which he told the two that the "restaurant has basically bec[o]me a fun house, and we need to stop being friends with our crew members," i.e., be tougher on the crew members. But when Crawford implemented the directive, Torres told crew members that Crawford was "being an ass." Despite the newfound friction, Crawford was never formally disciplined for any alleged misconduct leading up to her termination.

Torres fired Crawford less than two weeks after she had confronted him about his alleged discrimination toward Shelton. On March 17, 2014, Torres took Crawford aside to inform her that he was firing her because the crew members did not like working with her. Torres was "very vague about" purported complaints from the crew and would not tell Crawford who had complained. Confused, Crawford asked why she hadn't heard about any complaints before; Torres replied that "it didn't really become a problem until Friday," even though nothing had happened the previous Friday that could have been the basis for that statement. Torres got in his car and left immediately after the conversation.

She alleged that she was fired because she is African American (discrimination), and because she had accused her manager of race discrimination (retaliation). Chipotle successfully moved for summary judgment on both claims, and Crawford timely appealed.

Federal and Ohio labor law prohibits retaliating against employees who oppose unlawful employment practices. To establish a prima facie case of retaliation, Crawford must show:

(1) she engaged in protected activity (i.e., communicated opposition to discriminatory employment practices);

(2) Chipotle was aware of the protected activity;

(3) after Crawford engaged in protected activity, Chipotle took an adverse employment action against her; and

(4) the protected activity caused the adverse action.

If Crawford establishes her prima facie case, the burden shifts to Chipotle to provide evidence of a "legitimate, nondiscriminatory reason" for terminating Crawford. Then Crawford must show that Chipotle's proffered reason is mere pretext for unlawful retaliation. She can do so with evidence that Chipotle's reason had no basis in fact, did not actually motivate the decision, or was insufficient to warrant the adverse action.

Crawford says that five portions of the record support a causation inference:

(1) she "was dismissed less than two weeks after she told Torres to stop discriminating against Shelton";

(2) Torres' behavior toward Crawford changed after the confrontation;

(3) the alleged complaints against Crawford, even if true, became an issue only after Crawford accused Torres of discrimination;

(4) Amaya was more favorably treated; and

(5) Crawford never received a purported disciplinary document on which Chipotle relied during the deposition, nor did she ever participate in the discussion supposedly described in that document.

This evidence, while lean, is just enough.

Though Crawford asserts that the timing of her termination, which was less than two weeks after the protected activity, raises an inference of causation, even though temporal proximity alone is generally insufficient to survive summary judgment.

Instead, the plaintiff usually must offer evidence beyond mere temporal proximity. Here, Crawford's additional evidence is just sufficient to supplement the temporal proximity. For example, Torres supported Crawford's career advancement until she accused him of discrimination, after which he called her "an ass."

Further, Crawford's testimony that she never received the disciplinary document or participated in the conversation referenced therein is, if believed, also circumstantial evidence of causation. **A jury could reasonably infer that a purportedly false disciplinary document was evidence of intent to hide impermissible motivations**.

Drawing all inferences in Crawford's favor, as we must, Chipotle is not entitled to summary judgment on the causation element. Crawford has therefore made out all four elements of her prima facie retaliation case.

Crawford testified that she would have been surprised if any crew members disliked working with her. In fact, she reported that both Torres and another Chipotle manager

had pressured her to "toughen up more," because she "was kind of a pushover" with the crew.

But despite being "kind of a pushover," there is evidence that she was a good supervisor overall. She had been promoted twice in two years and was expecting a third promotion, this time to a salaried position. Although Crawford had initially struggled to win over the crew members, she made successful efforts to improve those relationships. She even said that the crew members were her "family," and reported that "a majority of the crew felt more comfortable" coming to her with complaints than to Torres or Amaya. And when she told crew members about her termination, they asked, "well, who doesn't like working with you?"

Additionally, when Torres terminated Crawford, he was "very vague about" his reason for doing so, refused to give Crawford specific names of disgruntled employees, and drove away immediately after firing her. Crawford asked him why she had not previously heard about the crew's dissatisfaction with her; Torres told her that it had not "really become a problem until Friday," without explaining why Friday would have been an inflection point. And Crawford testified that nothing had happened on Friday that would justify such a statement.

Further, Crawford's testimony that she never received the disciplinary document or participated in the conversation referenced therein is, if believed, also circumstantial evidence that she did not actually have issues working with her subordinates. A jury could reasonably infer that a purportedly false disciplinary document was evidence of intent to justify the termination after the fact. All of this evidence casts doubt on whether Torres was being forthcoming with his real reasons for terminating Crawford.

Therefore, drawing all reasonable inferences in Crawford's favor, and "disregard[ing] all evidence favorable to [Chipotle] that the jury is not required to believe," Crawford has presented enough evidence for a jury to infer that Chipotle's stated reason for the termination had no basis in fact. The district court, therefore, erred in keeping Crawford's retaliation claims from the jury.

V. EMPLOYEE TRANSFER IS RETALIATION

In Garcar v. City of Youngstown, Case No. 4:17CV16698, 2019 U.S. Dist LEXIS 32257 (N.D. Ohio, 2019), Patricia Garcar is a police officer serving the Youngstown, Ohio, police department since 1994. From 1999 to 2004 and again from 2006 to 2014, she was assigned to the department's accident investigation unit (AIU).

In 2011, the AIU came under the leadership of Lieutenant William Ross. He was Garcar's immediate supervisor, and she was the second-ranking officer in the unit. According to her, when he came to the unit, he brought a host of issues with him. She alleged that, before he came to the unit, she had no issues with her previous supervisors. He frequently changed her assignments by taking her off new hire training and instead assigning male officers in her place. He also put her in a smaller vehicle that made it difficult to haul the equipment she needed to complete accident investigations.

From 2011 until 2014, Ross formally disciplined Garcar on several occasions. In 2011, she was verbally reprimanded and docked pay for reporting late to work. In 2012, she was issued discipline because she was posted in the wrong location during an assignment to safeguard a motorcade for the Vice President of the United States. In 2014, Ross alleged she had submitted time sheets for periods in which she hadn't reported to work. She filed internal appeals and prevailed after the 2012 and 2014 incidents.

In addition to filing formal appeals, Garcar complained to police chiefs Robin Lees and Rodney Foley. She told them "Lt. Ross's conduct, hostility, and disparate treatment made it difficult for her to do her job and come to work." She felt her complaints were falling on deaf ears, and in April 2014, she filed a sex discrimination charge with the EEOC.

In an effort to resolve the EEOC charge, Lees ordered Garcar transferred from the AIU to the family services investigation unit in July 2014, three months after her charge was filed. Though her transfer didn't result in a change of job title or salary, she opposed it and believed it had a negative effect on her career. She filed a second EEOC charge in October 2014, this time alleging she was transferred out of the AIU in retaliation for filing a charge with the agency.

The EEOC determined there was reasonable cause to believe the Youngstown Police Department unlawfully retaliated against Garcar for filing her first charge. She filed a lawsuit against the department in an Ohio federal court alleging, among other things, retaliation in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02.

The department requested summary judgment, arguing that based on the record, there was no set of facts that would set forth a violation of law.

In order to prevail on a retaliation claim under Title VII and Ohio Revised Code 4112.02, an employee must establish:

1. She engaged in protected activity;

2. Her employer was aware she engaged in that activity;

3. It took adverse action against her; and

4. There's a causal connection between the protected activity and the adverse action.

In Garcar's case, the first, second, and fourth prongs were indisputably satisfied. She engaged in protected activity when she filed her first EEOC charge. In turn, the department received notice of her charge and transferred her out of the AIU, admittedly because of her claims.

Therefore, the only question to determine was whether the transfer resulted in an adverse action against her.

The court held there was a plausible argument the transfer was an adverse employment action. Although Garcar's transfer wasn't accompanied by a change in title or salary, it significantly changed, and arguably diminished, her responsibilities. Further, it gave her

fewer opportunities to earn accumulated time and inhibited her prospects to work in the private sector while on the force and after retirement.

WHAT DOES THIS MEAN FOR HR?

When an employee alleges workplace harassment or discrimination, far too many employers tend to want to transfer the whistleblower to a different role or environment as a way to defuse the situation. Transferring an employee who raises a workplace complaint could trigger a costly retaliation suit, however, regardless of whether it results in a reduction in title or pay.

VI. HARASSMENT BY ASSOCIATION COUNTS

In Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009), Lynette Barrett, W. T. Melton, and Treva Nickens (from hereon referred to as the "plaintiffs.") were three Caucasian women who worked at the LaVergne, Tennessee Whirlpool facility. On various occasions, the plaintiffs would have conversations with other employees who were African American. These plaintiffs claimed they were discriminated against based upon their friendships with and advocacy for certain African-American co-workers. Examples of the alleged racially discriminatory incidents that occurred against the plaintiffs included:

- overhearing co-workers use racial slurs and telling racist jokes;
- being told "missed you ladies at the [Ku Klux] Klan meeting last night";
- viewing racial graffiti in various places in the plant;
- being treated differently or being "snubbed" because of the employee's association with African-American employees;
- receiving less desirable work assignments; and
- not being considered for promotions.

The trial court granted summary judgment in the employer's favor. The lower court specifically ruled that the plaintiffs failed to show any real level of association with the African American employees. Instead, the court found that the plaintiffs failed to show that their level of association with the black employees rose above the level of workplace collegiality.

On appeal, the Sixth Circuit dismissed the claims of two of the white employees but upheld the claim for the remaining white employee.

First, the court held that the absence of a relationship outside of work does not immunize the conduct of harassers who target an employee because she associates with African-American co-workers. While one might expect the degree of an association between the parties to correlate with the likelihood of severe or pervasive discrimination on the basis

of that association, it does not determine whether one is protected by Title VII's "Association" provision.

For example, a non-protected employee who is married to a protected individual may be more ***likely*** to experience associational harassment than one who is merely friends with a protected individual, such an analysis goes to the question of whether the plaintiff has established a hostile work environment, not whether or not the plaintiff is protected under Title VII.

Therefore, the 6th Circuit concluded that the district court erred in requiring a certain degree of association before a non-protected employee may assert a viable claim under Title VII.

Instead, the court found that no particular degree of association is needed in order to state a claim of associational discrimination under Title VII. Instead, the court reasoned:

"If a plaintiff shows that:

1) she was discriminated against at work

2) because she associated with members of a protected class, then the degree of the association is irrelevant."

However, the court also held that "only harassment that specifically targeted those who associated with and advocated for African-Americans will result in an actionable hostile work environment claim for such individuals." In this case, the court found that only a few of the alleged discriminatory comments or actions were directed toward the two white plaintiffs whose claims were rejected. Most of the harassment alleged by these plaintiffs, albeit crude and racist, was directed at the African-American employees themselves. While the incidents may have been offensive, the court held they did not suggest discrimination or harassment of these plaintiffs.

According to the court, the third plaintiff established that she was subject to a regular stream of offensive comments about her relationship with an African-American co-worker and that her relationship allegedly was a reason preventing her from applying for job advancements. Therefore, summary judgment was inappropriate as to this plaintiff.

The court also held that the plaintiffs in this case were not required to actively "oppose" ant actions by the employer or its employees in order to secure Title VII protection. (citing to the recent Supreme Court decision, Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.).

Barrett reminds employers that all employees should understand that discriminatory comments and actions may affect not only employees of a protected class, but also employees who associate with those members. Clear anti-harassment policies and regular employee training are fundamental in today's workplace.

VII. RETALIATION: FMLA AND FLSA

A. Burlington Northern's Definition Of "Materially Adverse Employment Action" Applies To FMLA Retaliation Cases

In Millea v. Metro-North RR Co., No. 10-409 (2nd Cir. 08/08/2011), Christopher Millea suffered from severe post-traumatic stress disorder as a result of combat as a Marine during the First Gulf War. In 2001, Millea began working for Metro–North, a tri-state area commuter railroad. In 2005, he applied for special leave under the FMLA. Metro–North approved his application and granted him 60 days of intermittent FMLA leave for 2006.

In the summer of 2006, Millea was working in a Stamford storeroom under supervisor Earl Vaughn, with whom Millea had developed a contentious relationship. A phone conversation with Vaughn on September 18, 2006 developed into a heated disagreement that triggered one of Millea's panic attacks. Millea immediately left work to see his doctor. Because the encounter with Vaughn led to the attack, Millea did not inform Vaughn about his unforeseen FMLA leave.

Instead, he advised Garrett Sullivan, the Lead Clerk, and asked Sullivan to advise Vaughn, which Sullivan did. The next day, Millea called Sullivan at 5:45 am to report that he was taking another FMLA day. Sullivan again relayed the information to Vaughn. In both instances, Vaughn received timely, although indirect, notice of Millea's use of FMLA leave.

Metro–North's internal leave policy states:

> **"[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible."**

Because Millea did not notify Vaughn of his two absences directly, Vaughn told Metro–North's payroll department to log Millea's absences as non-FMLA leave. Metro-North then opened an official investigation of Millea, which resulted in a formal "Notice of Discipline" being placed in his employment file for one year. The Notice was expunged after a year, Millea having had no further disciplinary incidents. After the investigation, Millea voluntarily transferred to a custodian janitorial job, which paid slightly less but was not supervised by Vaughn.

Millea then filed suit against Metro-North. Millea claimed that he never violated Metro-North's internal leave policy because he notified Vaughn indirectly of his absences, or, in the alternative, that the aspect of Metro-North's policy he violated was void because it conflicted with the regulations implementing the FMLA.

Millea alleged the following claims:

- Interference with Millea's ability to take FMLA leave. See 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.").

- Retaliation against Millea for taking FMLA leave by: (i) placing a notice of discipline in his employment file for a year; (ii) requiring him to update his FMLA certification; (iii) creating a work environment that motivated him to transfer to a lower paying job; (iv) delaying approval of his bid for the lead custodian position in 2009; and (v) subjecting him to heightened managerial surveillance. See 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.").

On the interference claim, the Second Circuit Court of Appeals found for Millea. The court reasoned that there is no dispute that a company may discipline an employee for violating its internal leave policy as long as that policy is consistent with the law; however, we conclude that, on these facts, Metro-North's internal leave policy is inconsistent with the FMLA.

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). **However, this requirement is relaxed in "unusual circumstances" or where the company policy conflicts with the law**. Id.

The regulations implementing the FMLA provide that when an employee's need for FMLA leave is unforeseeable (as Millea's was), "[n]otice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." Id. § 825.303(a). Because this regulation expressly condones indirect notification when the employee is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option.

Whether Millea's situation on September 2006 constituted an "unusual circumstance" in which he was "unable" to personally notify Vaughn is a question of fact, not of law. The jury found that Millea gave proper notice, meaning his notice complied with the FMLA and all legally valid aspects of Metro-North's internal leave policy.

As for Millea's retaliation charge, Millea sought to define "retaliation" under the FMLA using the definition of "materially adverse employment action" articulated by the Supreme Court in the Title VII lawsuit, Burlington Northern & Santa Fe Railroad Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In particular, Millea proposed that an adverse employment action occurs when "a reasonable employee in the plaintiff's position would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially

adverse" **when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."**

Burlington Northern expanded the definition of "materially adverse employment action" for purposes of Title VII retaliation claims. Today, a Title VII plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court rejected the proposition that an act of retaliation must relate to the specific terms and conditions of the employee's employment.

The Second Circuit reasoned that this same rationale applies to the anti-retaliation provision of the FMLA. The FMLA's anti-retaliation provision has the same underlying purpose as Title VII-and is almost identical wording.

Therefore, the court held that under the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights.

Consequently, a "material adverse action" is restricted solely to changes in the employee's terms and conditions of employment, the district court committed legal error.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

In short, the standard for employees to meet into order to prove FMLA retaliation just got a lot lower. Rather than having to prove that the employer took some action against some tangible aspect of their job, all employees have to prove today is that the employer has created a working environment that is:

"… likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

Unfortunately for employers, this is a question of fact to be determined by a jury.

Therefore, again, HR professionals must make sure that their managers and supervisors are able to document why they are taking the actions they are against employees as well as being aware of what type of environment they are creating in the workplace. This area of "retaliation law" is just another example of where good old HR practices will do much to prevent lawsuits.

B. Opposition And Participation Coverage For Fair Labor Standards Act

The Fair Labor Standards Act, or "FLSA," states that it is unlawful:

> "To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in any such

proceeding, or has served or is about to serve on an industry committee" (29 U.S.C. § 215(a)(3)).

In the majority of jurisdictions, the courts have held that employees are covered for merely opposing an employer's alleged illegal practice under the FLSA. In general, the courts have held that an employee is protected from acts of retaliation for merely reporting an alleged FLSA violation to his employer. These courts have reasoned that it is the assertion of statutory rights that is the triggering factor, not the filing of a formal complaint. Therefore, in the majority of jurisdictions, employees are protected from any acts of retaliation for filing "any complaint" under § 215(a)(3), not only "civil complaints."

However, a minority of jurisdictions have held that an employee is not protected from the retaliatory acts of his employer for merely opposing an alleged illegal act under the FLSA. Instead, the employee must actually file a charge or participate in a Wage and Hour investigation. Such courts have reasoned that unlike Title VII's Opposition Clause, the "plain language" of § 215(a)(3) of the FLSA does not cover mere opposition by an employee.

Instead, these jurisdictions have held that § 215(a)(3) of the FLSA only protects employees when they have either:

1. Filed, instituted or caused to be instituted any formal proceedings under the FLSA,

2. Testified or are about to testify in any FLSA proceeding, or

3. Served or about to serve on any industry committee.

VIII. RETALIATION AGAINST THIRD PARTIES *DOES* ~~*NOT*~~ COUNT

In Thompson v. North American Stainless, No. 07-5040 (6th Circuit, March, 2008), Eric Thompson worked as a metallurgical engineer for North American Stainless. Miriam Regalado was hired by North American in 2000. Shortly thereafter, Thompson and Regalado started dating.

In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) against North American alleging that her supervisors discriminated against her on the basis of her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. A little more than three weeks later, on March 7, 2003, North American terminated Thompson's employment. Thompson alleged that he was terminated in retaliation for Regalado filing her EEOC charge. North American Stainless contended that Thompson was terminated due to his performance.

At the time of his termination, Thompson and Regalado were engaged to be married and their relationship was common knowledge throughout the company.

Thompson filed a charge of retaliation with the EEOC. The EEOC found there was "reasonable cause" to believe that North American violated Title VII and terminated

Thompson in retaliation for Regalado filing her charge of gender discrimination.

North American Stainless moved to have the lawsuit dismissed on summary judgment, arguing that Thompson's claim that his "relationship to Regalado was the sole motivating factor in his termination" was simply not illegal under Title VII even if Thompson's allegation was true. The district court granted North American's motion, holding that Thompson failed to state a claim under Title VII.

Thompson appealed this dismissal to the Sixth Circuit Court of Appeals arguing that the anti-retaliation provision of Title VII does in fact prohibit an employer from terminating an employee based on the protected activity of his fiancée who worked for the same employer. In reviewing the case, the Sixth Circuit examined Section 704(a) of Title VII of the Civil Rights Act, which prohibits retaliation by employers against employees who exercise their rights under Title VII.

> It shall be an unlawful employment practice for an employer to discriminate against any of its employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. (42 U.S.C. § 2000e-3)

Further, in Burlington Northern and Santa Fe Railway Co. v. White, – U.S. –, 126 S.Ct. 2405 at 2412 (2006), the U.S. Supreme Court held that:

> "The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."

The Supreme Court then went onto hold in Burlington that a Plaintiff must demonstrate that he suffered a "materially adverse" retaliatory action, which it defined as one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." In this case, a literal reading of section 704(a) suggests a prohibition against employer retaliation only when it is directed to the individual who conducted the protected activity. However, such a reading "defeats the plain purpose" of Title VII. There is no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would in fact dissuade "reasonable workers" from engaging in such actions.

The court then looked to the EEOC Compliance Manual to support its reasoning. The EEOC's Compliance Manual expressly states that a person claiming retaliation need not be the one who conducted the protected activity. Specifically, in Johnson v. University of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000), the court reasoned:

> "Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." (quoting EEOC Compliance

Manual (CCH) ¶ 8006).

Therefore, the Sixth Circuit reasoned that Title VII does in fact prohibit employers from taking retaliatory action against employees not directly involved in a protected activity, but who instead are so closely related to or associated with those who are directly involved that it is clear the protected activity motivated the employer's adverse actions. To hold otherwise, reasoned the court, would undermine the purposes of Title VII.

The Sixth Circuit then remanded the case back to the lower court for reconsideration.

However, on **June 5, 2009**, the case made its way ***back*** to the Sixth Circuit. This time, the court ruled that because Thompson did not allege he engaged in any statutorily protected activity (i.e., did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation), the court found by the plain language of Title VII that Thompson was ***not*** included in the class of persons for whom Congress created a retaliation cause of action. The 3rd, 5th, and 8th circuits agreed.

Therefore, this time, the 6th Circuit ruled in favor of the employer and dismissed Thompson's claim.

The court distinguished the recent Supreme Court's decision in Crawford v. Metro Gov't of Nashville and Davidson County, Tenn., 129 S.Ct 846 (2009), (which abrogated the 6th Circuit's view that the opposition clause required active, consistent behavior), by stating that Crawford involved involuntary testimony while Thompson did not engage in any protected activity.

U.S. SUPREME COURT'S DECISION

On January 25, 2011, the US Supreme Court unanimously held that firing Thompson was unlawful retaliation under Title VII.

In reaching its decision, it applied Burlington Northern v. White, 548 US 53 (2006). Specifically, the Court said, "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

The Court found that Title VII grants Thompson a cause of action because he is a "person claiming to be aggrieved ... by an alleged employment practice." He was within the "zone of interests" sought to be protected by the statute. Therefore, the Court held that third party retaliation is clearly a legitimate cause of action.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Document ... Document ... Document!

Since this decision opens the door of retaliation lawsuits to third parties, or bystanders, employers must be able to show why they are taking an adverse action against an employee. Even though the Thompson case dealt with a fiancé relationship, which later become a spousal relationship, the reasoning of the court relied heavily on the EEOC Compliance Manual (CCH) 8006, which states:

> "Title VII . . . prohibit[s] retaliation against ***someone so closely related to or associated with the person exercising his or her statutory rights*** that it would discourage that person from pursuing those rights." (quoting EEOC Compliance Manual (CCH) ¶ 8006).

As a result, close acquaintances and friends of employees who exercise their rights under Title VII and other employment laws may also very likely have the same protections as Mr. Thompson whenever they feel their employer has targeted them due to their support of another protected employee. Such a scenario may give protections to employees the employer never even considered as being protected.

Again, if it is not written down ... it did not happen. Document ... Document ... Document!

IX. OPPOSITION CLAUSE RETALIATION: PARTICIPATING IN INVESTIGATIONS IS A PROTECTED ACTIVITY

In Crawford v. Metropolitan Government of Nashville and Davidson County, No. 06–159129 S.Ct 846 (U.S. Supreme Court, January 26, 2009), the Metropolitan Government of Nashville and Davidson County ("Metro") opened an internal investigation into allegations of sexual harassment against Dr. Gene Hughes ("Hughes"), the employee-relations director for the Metro School District, in 2002. Since Hughes was responsible for investigating sexual harassment claims, direct complaints were not raised with him. Instead, such complaints went to the Metro legal department. Metro assigned the Human Resources Department to investigate the complaint, and Human Resources interviewed several women who worked with Hughes, including Petitioner Vicky Crawford ("Crawford").

During the interview, Crawford related several specific instances of sexual harassment by Hughes. Crawford also stated during the interview that she was afraid that her participation in the internal investigation would result in her losing her job.

Ultimately, the investigation concluded that no witnesses could corroborate the extent of the harassment that the employees had complained of, so no disciplinary action was taken against Hughes. After the findings of the investigation had been released, Crawford was fired from Metro on charges of embezzlement. However, these claims were later "found to be unfounded."

Other women interviewed during the internal investigation were similarly discharged.

Crawford filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and brought suit, alleging retaliation under Title VII of the Civil Rights Act of 1964.

Title VII states that "it shall be unlawful practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a).

Crawford asserted that she "opposed" the harassment by participating in the internal investigation, and therefore her participation was protected activity under Title VII. The district court granted summary judgment in favor of Metro, stating that cooperation with an investigation did not constitute opposition under the statute.

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed, holding that precedent dictates that unless an employee has participated in an EEOC investigation or engaged in persistent oppositional behavior, Title VII does not cover employee participation in an employer-initiated internal investigation. Crawford appealed to the Supreme Court of the United States, arguing that Title VII does cover participation in an employer's internal investigation.

Discussion

This case will decide whether employee involvement in internal investigations of sexual harassment qualifies as "protected activity" under Title VII's anti-retaliation provision, such that the provision protects employees from being demoted or fired for their statements. Crawford wants the provision to protect all employees in all internal investigations of possible Title VII violations.

Respondent, Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") says the provision should only apply to the investigations employers must conduct once charges are filed against them with the EEOC and employees who proactively complain of discrimination before contributing to an investigation.

Crawford argued that if the anti-retaliation provision did not apply in internal investigations, witnesses who had witnessed but not personally experienced harassment would have no protection against a dishonest employer who seeks to erase evidence of the harassment.

However, the United States Chamber of Commerce ("COC") and attorneys writing for the Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center ("EEAC et al.") caution that a ruling for Crawford would discourage thorough employer-initiated investigations. Employers could face expensive retaliation lawsuits if they demoted or terminated an underperforming employee who had once taken part in an internal investigation.

Furthermore, the National School Boards Association claims that a holding for Crawford could encourage dishonest employees to make up accusations during an internal investigation in order to protect themselves against adverse employment action. Therefore, employers might fail to investigate alleged instances of discrimination and harassment or invite participation only from employees with strong performance records.

Analysis: Scope of "Opposition"

Crawford argued that her participation in Metro's internal investigation is protected under the Title VII opposition clause, for "opposition" cannot be interpreted so narrowly as to only cover active complaints employees have initiated. She defines opposition as "action

(including making a statement) to end, redress or correct unlawful discrimination," and states that informing the employer of the harassment helps resolve it.

To support her argument, Crawford cites the EEOC Compliance Manual, which states that an employee's actions constitute opposition if they "would reasonably [be] interpreted as opposition." Crawford contends that under these definitions, her actions are clearly "opposition," as an employee participating in an internal investigation intends to "prevent" unlawful behavior by the very nature of her participation.

Metro advocates a narrower interpretation of "opposition," following the interpretation adopted by the Sixth Circuit, which would require that an employee take active opposition to an employer's behavior in order to be protected by Title VII's anti-retaliation clause. Thus, according to Metro, the clause does not reach an employee who is merely *reacting* to a situation, such as answering questions in an internal investigation as Crawford was doing. Metro instead argued that it would not be in keeping with an employee's duty to reasonably avoid harm according to Faragher and Ellerth if such a lax interpretation of "opposition" were allowed.

Instead, Metro contends that requiring "opposition" to be overt and active, as the Sixth Circuit did, prevents the scenario where **any** action taken by a plaintiff, including a "casual conversation" about someone with another person, would be considered protected "opposition."

Metro contends that if employees who passively take part in internal investigations are protected under the Title VII opposition clause, this will result in employees who are dismissed independent of their cooperation in an internal investigation having the ability to "ambush" their employers by claiming retaliation. To avoid this outcome, Metro argues that a narrower definition of "opposition" be adopted, so that an employee's actions must be seen as active "resistance" to the discrimination being alleged.

U.S. SUPREME COURT'S RULING

The anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but also in answering questions during an employer's internal investigation. The Court reasoned that because "oppose" is undefined by statute, it carries its ordinary dictionary meaning of "resisting or contending against" some issue. Crawford's statements made in the course of this investigation were therefore protected by the "Opposition Clause" of Title VII.

The Court reasoned that the term "oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" something by responding to someone else's questions just as surely as by provoking the discussion. Nothing in the statute requires a "freakish rule" protecting an employee who reports discrimination on her own initiative but does not protect another employee who reports the same discrimination in the same words when asked a question.

Metro unconvincingly argues for the Sixth Circuit's active, consistent opposition rule,

claiming that employers will be less likely to raise questions about possible discrimination if a retaliation charge is easy to raise when things go badly for an employee who responded to enquiries. Employers, however, have a strong inducement to ferret out and put a stop to discriminatory activity in their operations.

The 6th Circuit's ruling could undermine the Ellerth-Faragher decisions, along with the statute's " 'primary objective' " of "avoid[ing] harm" to employees. If an employee who is answering questions in an investigation can be penalized with no remedy for providing information in an investigation, prudent employees would have a good reason to keep quiet about Title VII offenses.

Also, because Crawford's conduct was found to be protected by the opposition clause, the Court did not make any ruling on whether Crawford was protected by the participation clause of Title VII.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Document ... Document ... Document!

Employers must be able to show why they are taking an adverse action against an employee.

Again, if it is not written down ... it did not happen. Document!

X. FORMER EMPLOYEE'S ARE COVERED

In Robinson v. Shell Oil Company, 117 S.Ct. 843 (1997), Charles Robinson was fired by Shell Oil Company. Robinson then filed a charge of discrimination with the EEOC. When Robinson applied for a position with another company, Shell Oil gave Robinson a bad reference. Robinson sued Shell Oil, claiming that this bad reference was in retaliation for filing a charge of discrimination with the EEOC. Shell Oil claimed Robinson was not protected by Title VII's Retaliation Provision since he was no longer an "employee" when the reference was given and Title VII only protects "employees" rights.

However, the Court reasoned that excluding former employees from the protections of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter the victims of discrimination from filing charges with the EEOC. Such a result would therefore provide employers with a "perverse incentive" to fire employees who might bring Title VII claims. The Court therefore held that former employees were also covered by § 704(a) of Title VII.

XI. EMPLOYER'S RESPONSE TO THE ILLEGAL HARASSMENT CHARGE

A. Employers Who Did It Right

In Yates v. Avco Corporation, 819 F.2d 630 (6th Cir. 1987), an employee who had reported acts of sexual harassment against her requested a transfer to another position in order to avoid her harasser. The employer agreed, and then transferred

the employee to a lower grade position at another facility. However, the employee's compensation and benefits remained the same. When the employee was later offered a promotion, she was asked to sign a statement indicating that her first transfer had been made at her request. The employee refused to sign and filed suit for retaliation under Title VII.

The court held for the employer and found that no acts of retaliation had been committed. The court reasoned that the original transfer was at the employee's request, and merely asking an employee to sign an acknowledgment to verify this fact is not viewed as being an adverse action. Further, the court held that these transfers did not harm the employee. The employee's compensation and benefits remained the same, even though she was being transferred to a lower grade position. Also, the employee was assured that she would receive the next available promotion. In fact, the employer did indeed offer the next promotion to the employee.

In Ferguson v. E.I. du Pont de Nemours and Company, 560 F.Supp. 1172 (D. Del. 1983), where the employer temporarily transferred an employee to another position with no reduction in pay or benefits, the court held that no adverse action had been taken against the employee.

In Canitia v. Yellow Freight System, Inc., 903 F.2d 1064 (6th Cir. 1990), Thomas Canitia testified against his employer, Yellow Freight System or "YFS," in a Title VII suit. After YFS lost this suit, Canitia received six letters of discipline in a two-month span and was then suspended. Upon Canitia's return to work, after being placed under surveillance by YFS, Canitia was terminated for unsatisfactory performance. Canitia sued YFS for retaliation under Title VII.

However, the court held that YFS had not retaliated against Canitia due to his testimony in a previous Title VII lawsuit. First, the court took notice of the fact that Canitia had received no less than twelve other letters of reprimand in the three years preceding his testimony. The court therefore reasoned that Canitia had not been subjected to a "sudden surge" of disciplinary actions after testifying against YFS.

Also, other employees testified against YFS as well, yet no record of any suspected retaliation existed regarding these employees. The court further noted that Canitia's suspension had been upheld by a joint union-management grievance committee. Additionally, the court held that YFS had presented to the court a legitimate nondiscriminatory reason for giving Canitia his most recent warnings and his subsequent termination: his poor work performance.

C. Employers Who Did It Wrong

In Duckworth v. Pratt & Whitney, Inc., No. 97-2244 (1st Cir. 1998), an employee who had used FMLA leave was laid off from his job. The employer then refused to recall the employee. The employee sued the employer for violating the FMLA.

The employer claimed that the FMLA only applies to current employees, as defined under the statute.

The court disagreed with the employer. The court ruled that any "employee can file an FMLA claim, regardless of whether the person is a prospective, current or former employee.

In Nero v. Industrial Molding Corp., No. 98-10020 (5th Cir. 1999), the interim plant manager suffered a heart attack. When he returned from FMLA leave, he was given three choices:

1. He could stay on as a shift supervisor at half the salary of the plant manager,

2. He could work as a shift supervisor for 90 days while he looked for another job or

3. He could terminate his employment immediately with two months of severance.

The manager opted to terminate his employment and immediately sued the employer for violating his rights under the FMLA and ERISA.

The company defended itself by saying that it had already decided to replace him as plant manager before he had the heart attack, so the decision to demote him was unrelated to his use of FMLA leave or his future liability to its health insurance.

The court found for the employee. Specifically, the court gave great weight to the fact that all of the employee performance appraisals showed that he was performing his job as plant manager in a satisfactory manner.

XII. AVOIDING RETALIATION CLAIMS

In general, in order to avoid retaliation claims by employees, employers should:

1. Beware of timing issues.

2. Follow proper documentation and counseling techniques.

3. Train managers in the law regarding retaliation claims under both the Participation and Opposition Clauses.

4. Never mention any protected activity of an employee in any counseling session. In fact, comments regarding these activities must be restricted to those sessions covering that topic only.

5. In cases of harassment, *never* transfer an employee against his/her wishes.

6. If an individual who is protected by the retaliation provisions of any statute is transferred, the employee should suffer no adverse affects (re: wages, benefits, promotability, etc.). If the transfer is a demotion in responsibility, the employee should be given the next available promotion for which he/she is qualified or may become qualified. The reasons for the transfer should be documented.

7. Consider using a Peer Review System to review disciplinary actions against employees. (Be certain to form such committees under the advice of legal counsel so as to not violate the National Labor Relations Act and be viewed as forming an employer sponsored union.)

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

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