CLEAR LAW INSTITUTE

UPDATES TO WHISTLEBLOWING AND RETALIATION

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INTRODUCTION

- Covers topics related to retaliation and whistleblowing laws
- Focus on unique, new, and timely topics
- Use legal insights to give practical advice on how best to manage and litigate retaliation and whistleblowing issues and claims
- Emphasis on update regarding Dodd-Frank and SOX whistleblower provisions, hot 2013-2015 Dodd-Frank and SOX whistleblower cases, and the what the landscape will look like in the future for these sorts of claims

NASSAR AND THE CAT'S PAW DOCTRINE

- Do the *Nassar* and *Gross* But-For Causation Standard Render the *Staub v. Proctor Hospital* Cat's-Paw Theory Unavailable in Title VII or ADEA Retaliation cases?

  The courts of appeals to specifically consider the issue have found that the "cat's paw" theory can apply in a Title VII retaliation cases, but that the biased supervisor's animus must be "a 'but-for' cause of, or a determinative influence on," the employer's ultimate decision – merely being a "motivating factor" is not good enough. *See Zamora v. City Of Houston*, __ F.3d __, 2015 WL 4939633 (5th Cir. Aug. 19, 2015); *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1070 (6th Cir. 2015); *Ward v. Jewell*, 772 F.3d 1199, 1203, 1205 (10th Cir. 2014).

HR, COMPLIANCE PERSONNEL, AND MANAGERS?

- Many Courts Hold That Human Resources Personnel And Other Managers Must "Step Outside" Their Normal Job Duties To Engage In Protected Oppositional Activity Under Title VII And Other Anti-Discrimination and Anti-Retaliation Laws
  - *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008)
  - *Brush v. Sears Holdings Corp.*, No. 11–10657, 2012 WL 987543 (11th Cir. Mar. 26, 2012)
  - So, "I was just doing my job and they fired me for it!" often gets the HR plaintiff – and other managers – thrown out of court on a retaliation claim based on the opposition-clause.

HR, COMPLIANCE PERSONNEL, AND MANAGERS?

But . . . this so-called "manager rule" was rejected as a matter of law as being incompatible with Title VII in August 2015, in the recent cases of *DeMasters v. Carilion Clinics*, __ F.3d __, No. 13-2278, 2015 WL 4717873 (4th Cir. Aug. 10, 2015) and *Littlejohn v. City of New York*, __ F.3d __, 2015 WL 4604250 (2nd Cir. Aug. 3, 2015).

This created a circuit split. So, the status of this rule is uncertain and/or in conflict in many jurisdictions. Keep your eye on the law in this area as it develops and the U.S. Supreme Court possibly takes a case concerning this issue.

HR, COMPLIANCE PERSONNEL, AND MANAGERS

- Does this rule apply to SOX retaliation claims?
- *Riddle v. First Tennessee Bank*, No. 3:10–cv–0578, 2011 WL 4348298, at *8 (M.D. Tenn. Sept. 16, 2011), *aff'd*, NO. 11-6277, 2012 WL 3799231 (6th Cir. Aug. 31, 2012) said "yes," but without analysis or meaningful discussion.
- In contrast, the Administrative Review Board takes the opposite view. *See Robinson v. Morgan–Stanley*, Case No. 07–070, 2010 WL 348303, at *8 (ARB Jan. 10, 2010) ("[Section 1514A] does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties.");
- And, at least one federal district court has followed the ARB on this point. *See Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (rejecting employer's argument that the employee's SOX claim had to be dismissed because she never stepped outside her role).

SEEMINGLY "NO BRAINER" TERMINATION DECISIONS CAN BECOME CLOSE CALLS WHEN THE EMPLOYEE HAS BEEN PARTICIPATING IN PROTECTED ACTIVITIES

- Expressing A Desire To Kill A Supervisor: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)
- Expressing A Desire To Knock Out A HR Manager's Teeth: *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190 (7th Cir. 2011)
- Failing To Satisfy A Performance Improvement Plan's Objective Sales Production Goals That Were Put In Place Before The Employee Engaged In Protected Activity: *Smith v. Xerox Corp.*, 371 Fed. Appx. 514 (5th Cir. Mar. 2010)

POSITIVE TREATMENT OF AN EMPLOYEE AFTER THEIR PROTECTED ACTIVITY IS OFTEN – BUT NOT ALWAYS – REGARDED AS POTENT PROOF OF NON-RETALIATION

- In *Brady v. Houston Independent School Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997) and *Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006), the courts relied on such evidence to reject retaliation claims.

- But, in *Feder v. Bristol-Myers Squibb Co.*, 33 F. Supp. 2d 319, 339 (S.D.N.Y. 1999), the court was unimpressed and skeptical of such evidence.

- Still, if an employer can do something nice for an employee after they have engaged in protected activity, it normally helps.

A SUFFICIENTLY SPECIFIC INTERNAL COMPLAINT, WHETHER ORAL OR WRITTEN, IS PROTECTED FROM RETALIATION UNDER THE FLSA

- In *Kasten v. Saint–Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), the U.S. Supreme Court held that an employee's oral complaint could fall within the purview of the FLSA's anti-retaliation provision.
- The Court did not say if the oral complaint had to be to the DOL, rather than to the employer, to be protected.
- But, every circuit to rule on the question has held that an internal complaint to the employer can qualify as protected activity under the FLSA. *See, e.g.*, *Greathouse v. JHS Sec., Inc.*, 784 F.3d 105 (2nd Cir. 2015); *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105 (2nd Cir. 2015); *Minor v. Bostwick Laboratories, Inc.*, 669 F.3d 428 (4th Cir. 2012).
- The complaint must be sufficiently specific to alert a reasonable employer that a FLSA violation is being alleged.

SEVERANCE AGREEMENTS GENERALLY CANNOT INDEPENDENTLY GIVE RISE TO VALID RETALIATION CLAIMS, BUT THEY SHOULD STILL BE HANDLED WITH CARE

- *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006) caused great concern.
- But, subsequent cases limited *Lockheed Martin*.
- In 2013 and 2014, however, the EEOC initiated new lawsuits challenging separation agreements with fairly standard provisions in them (see paper). *E.g., EEOC v. CVS* case, which was thrown out in October 2014 (the EEOC is appealing).
- Make sure your severance agreement clearly permits the employee to go to the EEOC, or other agency. They just cannot obtain any money themselves from such action, as they are releasing any claim for monetary relief.
  - Note: In February 2015, The SEC Office of the Whistleblower expressed similar concerns regarding SOX and the use of overbroad confidentiality provisions in separation agreements and other agreements.

IF AN EMPLOYEE ENGAGES IN MORE PROTECTED ACTIVITY AFTER AN EMPLOYER TAKES SOME ACTION AGAINST THEM, DOES THAT MEAN THAT THE EMPLOYER'S ACTION WAS NOT MATERIALLY ADVERSE, AND THUS NOT ACTIONABLE AS RETALIATION?

- In *Bush v. Regis Corp.*, 257 Fed. Appx. 219, 222 (11th Cir. 2007) and *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437, 441-42 (5th Cir. 2007), the Courts of Appeals determined that the plaintiffs had not shown that the challenged allegedly retaliatory actions (written warnings) might dissuade a reasonable employee from filing a charge in part because the plaintiffs had not in fact been deterred from subsequently filing charges of discrimination.

- **But not all courts agree:** *See Turrentine v. United Parcel Service, Inc.*, 645 F. Supp. 2d 976 (D. Kan. 2009) (stating such a rule "defies logic"); *see also Chowdhury v. Bair*, 604 F. Supp. 2d 90, 97 (D.D.C. 2009) (stating that the standard is whether a reasonable person would be dissuaded from engaging in protected activity, whether or not the plaintiff was).

STANDARDS FOR PROTECTION FROM RETALIATION OFTEN DIFFER DRAMATICALLY DEPENDING ON WHETHER THE "OPPOSITION" OR "PARTICIPATION" CLAUSE APPLIES

- Oppositional Activity Must Be Based On A Good-Faith, Reasonable Belief, And The Activity Itself Must Be Reasonable, Or Else It Loses Its Protection

    1. There Is A Good-Faith Reasonable Belief Requirement For Oppositional Activity To Be Protected

    2. Oppositional Activity Must Be Reasonable In The Manner It Is Exercised, Or Else It Loses Its Protection

    Example – employee takes confidential information to support case, gets caught, and is fired.

CONTINUED: STANDARDS FOR PROTECTION FROM RETALIATION DEPENDING ON APPLICABLE CLAUSE

- Participation In Protected Activity Generally Need Not Be Based On A Good-Faith, Reasonable Belief To Be Protected, And Need Not Be Reasonable In The Manner Exercised, Although The Law Is Not Uniform On These Points

    1. Courts, Including the Fifth Circuit, Generally Hold That The Participation Clause Does Not Include A Good-Faith Reasonable Belief Requirement, Although The Seventh Circuit Disagrees

    2. Courts Generally Hold That The Manner In Which Participatory Activity Is Exercised Need Not Be Reasonable To Be Protected, Although Again The Seventh Circuit Disagrees

- Courts Are Split On Whether Participation In An EEOC Investigation By Giving Statements *Against* The Complainant Is Protected From Retaliation

WHEN IS AN EMPLOYEE'S PARTICIPATION IN AN INTERNAL INVESTIGATION "PROTECTED ACTIVITY" UNDER TITLE VII?

A. Participation In A Purely Internal Investigation Is Not Covered By Title VII's Participation Clause

B. Participation In An Internal Investigation Triggered By An EEOC Charge Is Covered By Title VII's Participation Clause

C. Participation In An Internal Investigation – Even If Not Triggered By An EEOC Charge – May, In Some Cases, Still Be Covered By Title VII's Opposition Clause Under The U.S. Supreme Court's Pro-employee Holding In *Crawford v. Metro. Gov't of Nashville and Davidson Cty.*, 555 U.S. 271 (2009)

RETALIATORY HARASSMENT IS ACTIONABLE

- *See Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012):
  - Noting that every circuit agrees retaliatory harassment is an actionable claim, including the Fifth Circuit
  - Adopting such a claim as a matter of first impression for that court
  - Affirming a seven-figure verdict based on such a claim

RETALIATION AND THE EXHAUSTION REQUIREMENT: A CONFLICT IS BREWING

- *Gupta* and cases like it carve out an exception to exhaustion for retaliation that occurs after the filing of an EEOC charge.
- There is an argument that the *Gupta* exception to exhaustion no longer applies after the Supreme Court's decision in *Morgan* in 2002.
- The current landscape in the *Gupta v. Morgan* battle: A couple of courts – including the 10th Circuit and 8th Circuit – have found that the *Gupta* exception no longer applies. Most courts hold that it does. But, many courts have not addressed the issue yet, so stay tuned.
- At some point, this will go to the Supreme Court.

UPDATE ON THIRD-PARTY RETALIATION: *THOMPSON* AND BEYOND

- *Thompson* – 2011 U.S. Supreme Court case green-lights these claims in certain situations.

- Post-*Thompson* Cases

1. Dating Relationship
2. Best Friend
3. Spouses Employed At Two Different Employers
4. *Thompson* Extends To The ADEA
5. District Courts Split On Whether The FMLA Permits Third-Party Retaliation Claims

COUNTERCLAIMS AS ACTIONABLE RETALIATION?

- Some courts say only if they have no basis at all in law and fact.
- Others reject that extremely high standard, and focus simply on whether the plaintiff's legally protected activity was the but for cause of the counterclaim.
- In Title VII/ADEA context, don't overlook the issue of exhaustion.

2010 DODD-FRANK ACT

- Some Background:
  - SEC created "Office of the Whistleblower" to administer the "Bounty Program"
  - Sean McKessy, ex-Altria Group lawyer, is the Chief of the Office of the Whistleblower, and he has a staff of lawyers and investigators
  - McKessy's Office is receiving an average of seven complaints per day since it opened in August 2011 – he says they are generally high quality
  - First bounty was awarded in August 2012 in amount of $50,000.00. $14 million dollar bounty awarded to one whistleblower in 2013! Then $30 million in September 2014!
  - McKessy's Office issues a comprehensive annual report every November

2010 DODD-FRANK ACT

- Who Can Qualify As a Whistleblower?

1. The Basic Definition Of A Whistleblower Under Dodd-Frank

2. Although Dodd-Frank Explicitly Defines A "Whistleblower" In A Way That Only Includes Those Who Provide Information To The SEC, An Exception Has Been Carved Out That Is Rooted In A "Catch-All" Part Of The Law

   a. Dodd-Frank's "Catch-All" Provision Providing Whistleblower Status To Employees Who Make Certain Internal Disclosures (*see, e.g., Egan I* and *Kramer* cases)

   b. Will Dodd-Frank's "Catch-All" Provision Swallow SOX? (*Asadi* v. Many Other Cases Split)

   c. On August 4, 2015, the SEC weighed in on this, and rejected *Asadi*.

CONTINUED: DODD-FRANK: WHO CAN QUALIFY AS A WHISTLEBLOWER?

3. Individuals Who Have A Legal Or Contractual Duty To Report Violations Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank

4. Individuals In Compliance-Related Roles Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank

5. Exceptions To The Exclusions From The Definition Of A Whistleblower Under Dodd-Frank

6. Criminal Violators Can Be Whistleblowers Under Dodd-Frank

7. But important note: an Employee Who Is Not A Whistleblower For Purposes of Dodd-Frank's Bounty Hunter Provision, May Still be A Whistleblower For Purposes Of Its Anti-Retaliation Provisions (*Ott v. Fred Alger Mgt.*).

WHISTLEBLOWER ANTI-RETALIATION PROVISIONS UNDER DODD-FRANK

More Avenues For Enforcement, An Expanded Statute Of Limitations, And Liquidated Damages

a. Direct Access To Federal Court

b. A Long Statute Of Limitations

c. Liquidated Damages For Retaliation In Violation Of Dodd-Frank

IMPLICATIONS OF THE FINAL RULES ON INTERNAL REPORTING PROCEDURES

1. Internal Reporting Is Not Required

2. Although Not Required, The Final Rules Encourage And Reward Internal Reporting

3. Internal Reporting Alone May Constitute Protected Conduct, If The Report Was Communicated To The SEC By Others, Or The Internal Report Falls Within The "Catch-all" Provision Recognized by many courts (but not the 5th Circuit (*Asadi*).

SOME IMPORTANT POINTS REGARDING DODD-FRANK

- Whistleblowers do not enjoy absolute protection based on a complaint to the Office of the Whistleblower; rather, the "reasonable belief" standard applies

- Case law will continue to to focus on whether Dodd-Frank's "catch all" provision, Section 78u-6(h)(1)(A)(iii), essentially makes every SOX retaliation claim actionable under Dodd-Frank too. For example, in *Kramer v. Trans-Lux Corp*., No. 3:11cv1424(SRU), 2012 WL 4444820 (D. Conn., Sept. 25, 2012), the court found that claimants who could pursue claims for retaliation under SOX may now do so instead under Dodd-Frank, thereby avoiding OSHA, being subject to a much longer statute of limitations, and recovering potentially better damages. As fully explained in the paper, other district courts have found the same, but the Fifth Circuit rejected such an approach in *Asadi* in 2013.

- Right now, because of the current, generally pro-employee ARB panel, it still makes sense for many SOX claimants to go through OSHA and the administrative process.

- That will likely change based on which party is in the White House (and thus controls the ARB composition). This is why President Obama's election in 2008 and reelection in 2012 was so significant to SOX litigation.

SOME IMPORTANT POINTS REGARDING DODD-FRANK

- Section 78u-6(h)(1)(A)(iii) also prohibits retaliation against individuals for providing information to a law enforcement officer about the possible commission of a federal offense, which means Dodd-Frank covers situations totally disconnected from corporate fraud

- Dodd-Frank Section 1057 creates a robust private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. This particular provision requires filing with OSHA within 180 days.

- If the DOL has not issued a final order within 210 days of the filing of the complaint, the complainant has the option to remove the claim to federal court and either party can request a trial by jury.

- Section 1057 claims are exempt from mandatory arbitration agreements.

SOME IMPORTANT POINTS REGARDING DODD-FRANK

- The SEC is getting aggressive in:
  - Going after companies it believes retaliated against whistleblowers who made reports to the SEC. See, e.g., 2014 SEC v. Paradigm enforcement action, resulting in a $2.2 million settlement.
  - Using compliance professionals tips to go after companies, and then paying the compliance professionals. This has occurred at least twice, the most recent being a more than $1 million bounty paid to a compliance professional tipster in April 2015.
  - Going after companies using allegedly overbroad confidentiality agreement that the SEC believes impede the purpose of its program, as in SEC v. KBR, in which KBR paid a $130,000 fine for using such an agreement in April 2015.

SARBANES-OXLEY UPDATE

- *Parexel* And Its Prodigy Since May 2011

1. The Pre-*Parexel* Landscape – SOX claimants almost never won
2. *Parexel* dramatically alters the landscape in May 2011
3. Post-*Parexel* ARB Decisions – An Avalanche Of Favorable Decisions For SOX Complainants since *Parexel* was decided, including some really tricky and interesting ones like *Funke,* and another involving an in-house counsel in Houston (*Zinn I*)
4. Post-*Parexel* Federal Appellate Court Decisions That Follow *Parexel*
   a. *Wiest* (3rd Cir. 2013) – gives *Parexel Chevron* deference.
   b. *Lockheed Martin* (10th Cir. 2013) – gives *Parexel Chevron* deference.
   c. *Nielsen* (2nd Cir. 2014) – gives *Parexel Skidmore* deference.
   d. Rhinehimer (6th Cir. 2015) – gives Parexel Skidmore deference.

OTHER RECENT SIGNIFICANT SOX DECISIONS

1. The ARB Rules That Employer Breaches Of SOX-Mandated Confidentiality May Themselves Give Rise To Liability, Even If The Employee Did Not Suffer A Traditional Adverse Employment Action

   *This case out of Houston against Halliburton includes a cautionary tale about litigation hold notices concerning current employees, and was affirmed by the Fifth Circuit in November 2014.

2. The ARB Holds That The Determination Of Whether The Claimant Satisfied The "Contributing Factor" Standard Is To Be Made Without Considering The Employer's Controverting Evidence (*Fordham v. Fannie Mae* – Oct. 2014 and ARB *en banc* decision in *Powers v. Union Pacific* in March 2015).

3. The U.S. Supreme Court extends SOX to employees of private companies that contract with public companies (and beyond) in *Lawson,* a 2014 decision

4. The ARB Holds That SOX Section 806 Has No Extraterritorial Application

EXHAUSTION AND DAMAGES UNDER SOX

Exhaustion: the 4th and 5th Circuits held this year that SOX retaliation claims brought in federal district court must be exhausted through OSHA first, similar to Title VII claims and the EEOC (*Tesoro* and *Southpeak*).

Mental Anguish under SOX:

1. Courts Have Recently Changed Course Regarding Whether SOX Provides For Mental Anguish Damages. The 10th Circuit (*Lockheed*), 5th Circuit (*Halliburton*), and 4th Circuit (*Southpeak*) have all recently concluded that it does – all contrary to many earlier district court decisions.

2. The ARB Consistently Holds That SOX Permits The Award Of Mental Anguish Damages

CONCLUSION

- There are many hot areas still developing, both under anti-retaliation laws that have been with us for more than a half-century (Title VII), and those that are relatively new (SOX and Dodd-Frank).
- There are lots of moving parts, especially in the SOX / Dodd-Frank areas.
- We hope this presentation and accompanying paper help you in your daily practice.
- Feel free to contact me directly with any questions via e-mail or phone.

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