Retaliation Claims: Welcome To The Danger Zone

G. Scott Fiddler
Law Offices of G. Scott Fiddler
9601 Jones Road, Suite 250
Houston, Texas 77065
(281) 897-0070 – Telephone
scott@fiddlerlaw.com

Mark J. Oberti
Ed Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3555 – Telephone
mark@osattorneys.com
ed@osattorneys.com

Lizzette Palmer
Kinder Morgan, Inc.
500 Dallas Street, Suite 1318
Houston, Texas 77002
(713) 369-9155 – Telephone
Lizzette_palmer@kindermorgan.com

Law Office of G. Scott Fiddler, P.C.

Oberti/ Sullivan LLP

KINDER MORGAN

Goals of This Presentation

- Update you on the latest retaliation decisions
- Identify common mistakes employers make that lead to retaliation claims
- SOX whistleblower retaliation update
- Texas pattern jury instructions discussion
- Predict the next wave of retaliation lawsuits

Retaliation Under Title VII

"It shall be an unlawful employment 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 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.

Opposition & Participation Clauses

- "The opposition clause of § 2000e-3(a) requires the employee to demonstrate that she [or he] had at least a 'reasonable belief' that the practices she [or he] opposed were unlawful." *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996).
- The participation clause, however, does not include the "reasonable belief" requirement and provides broad protection to an employee who has participated in a Title VII proceeding. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

Retaliation Under TCHRA

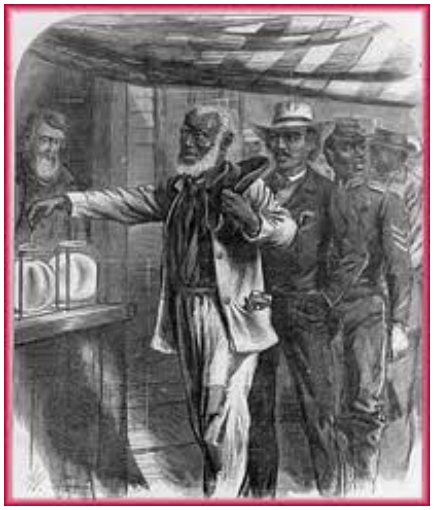
"An employer, labor union, or employment agency commits an unlawful employment practice if the employer, labor union, or employment agency retaliates or discriminates against a person who, under this chapter:

- (1) opposes a discriminatory practice;
- (2) makes or files a charge;
- (3) files a complaint; or
- (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.

TEX. LAB. CODE § 21.055

Section 1981

- "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. § 1981(a).
- In 1991, amended the statute, indicating that "make and enforce contracts … includes the making performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).
- Unlike Title VII or the TCHRA, there are no caps on damages under Section 1981



Retaliation Under Section 1981

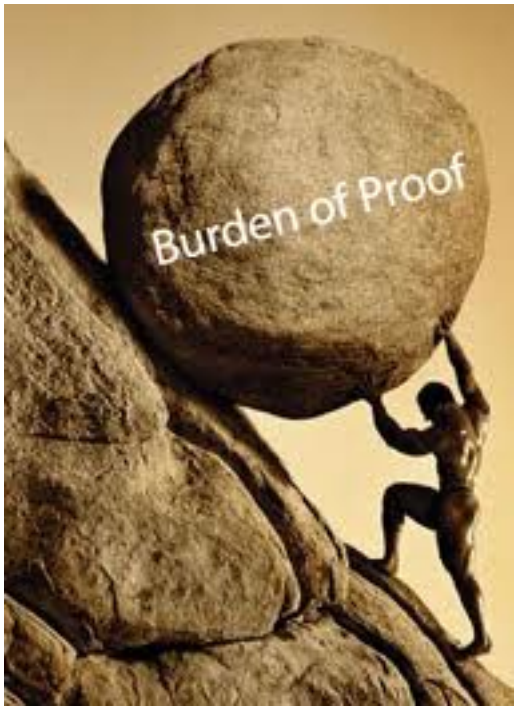
- "42 U.S.C. § 1981 encompasses claims of retaliation." *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008)

- **Takeaway Point:** No damage caps under Section 1981, but plaintiffs will be in federal court

McDonnell Douglas Framework

- "[T]he familiar *McDonnell Douglas* burden-shifting framework applies in Title VII retaliation cases."

- *Mato v. Baldauf*, 267 F.3d 444, 452 (5th Cir. 2001); *Gollas v. University of Tex. Health Sci. Ctr. of Houston*, 2011 WL 1834248, at *3 (5th Cir. May 12, 2011).



Plaintiff Must Establish A *Prima Facie* Case

- *Prima facie* case:
  - 1. Plaintiff's conduct constituted "protected activity";
  - 2. An adverse employment action followed; and
  - 3. a causal link exists the two
- *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004)

1. What Is Protected Activity?

- A common assumption of prospective plaintiffs is to think that any complaint is "protected"
- Whether the Plaintiff engaged in "protected activity" is a focus of litigation
- "[T]he complainant must indicate the discrimination occurred because of sex, race, national origin, or some other protected class." *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006)
- Plaintiff must have had a "reasonable" belief that the complained-of activity violated Title VII. *Clark Cty. Sch. Dist. v. Breeden*, 121 S. Ct. 1508, 1510 (2001) ("no reasonable person could have believed that the single incident recounted above violated Title VII's standard"); *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996)

1. What Is Protected Activity? (cont'd)

- "Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient." *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006); *see also Harris-Childs v. Medco Health Solutions, Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (same).
- *Richards v. JRK Property Holdings*, No. 10-101252010, WL 5186675, at *2 (5th Cir. Dec. 20, 2010) (plaintiff claiming she was terminated for refusing to falsify documents did not state a viable Title VII retaliation claim).

Must the Plaintiff personally participate? -- NO

- *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863 (2011) (Supreme Court reinstated a retaliation case where an employer terminated the fiancé of an employee who had filed a Charge of Discrimination with the EEOC)
- "[W]e have little difficulty concluding that if the facts alleged by [the Plaintiff] are true, then [the company's] firing of [the Plaintiff] violated Title VII." *Id.* at 867
- "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting *Burlington N. & S.F.R. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

Can Oppositional Conduct Go "Too Far" And Become Unprotected? -- YES.

- The laws against retaliation were "not meant to immunize insubordinate, disruptive, or nonproductive behavior at work." *Smith v. Tex. Dep't of Water Res.*, 818 F.2d 363, 365-66 (5th Cir. 1987).

Can Oppositional Conduct Go "Too Far" And Become Unprotected? -- YES.

- *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (disseminating employer's confidential information rendered oppositional activity unprotected)
- After weighing "the employer's right to run his business" against Jefferies's right "to express [her] grievances and promote [her] own welfare," the court determined that the plaintiff's form of opposition was unprotected. *Id.*

Can Oppositional Conduct Go "Too Far" And Become Unprotected? -- YES (cont'd)

- As *Jefferies* teaches, employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by a law, "may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected."

- *Douglas v. DynMcDermott Petroleum Operations* Co., 144 F.3d 364, 374 (5th Cir. 1998) (corporate counsel's revealing of confidential information in attempt to establish her claims of discrimination was not protected by Title VII).

2. What Is An Adverse Employment Action?

- "[T]he significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington N. & S.F.R. Co. v. White*, 126 S. Ct. 2405, 2415 (2006)
- "[T]he antiretaliation provision … is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412.

2. What Is An Adverse Employment Action? (cont'd)

- "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

- *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011) (quoting *Burlington N. & S.F.R. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

2. What Is An Adverse Employment Action? (cont'd)

- "[T]he bar on retaliating against 'employees' include[s] retaliating against former employees." *Brazoria Cty. v. EEOC*, 391 F.3d 685, 692 (5th Cir. 2004) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997))
- Beware of the negative employment reference

3. What Establishes A Causal Link?

- Courts look at:
  - (a) the employee's disciplinary record prior to their protected activity;
  - (b) whether the employer followed its typical policy and procedures in terminating the employee; and
  - (c) the temporal proximity between the employee's protected activity and termination.

Nowlin v. Resolution Trust Corp., 33 F.3d 498, 508 (5th Cir. 1994).

Timing Can Be Key In The Causal Link Part Of The *Prima Facie* Test

- *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) ("Action taken (as here) 20 months later suggests, by itself, no causality at all") (emphasis added).
- *Cantu v. Vitol, Inc.*, Civil Action No. H-09-0576, 2011 WL 486289, at *10 (S.D. Tex. Feb. 7, 2011) (Rosenthal, J.) (noting "the Fifth Circuit has found temporal proximity of up to four months sufficient to show a causal link.")
- *But See Gee v. Principi*, 289 F.3d 342, 347 n.3 (5th Cir. 2002) (a time lapse of two years between the protected conduct and the adverse employment action does not disprove a causal connection as a matter of law).

If *Prima Facie* Case Established, The Burden Shifts To The Employer

- Employer must then articulate a legitimate, non-retaliatory reason for the adverse employment action
- Defendant's burden is one of production, not persuasion
- *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004)

Burden Then Shifts Back To Plaintiff

- The burden then shifts back to the plaintiff to show either:
- "(1) that the defendant's reason is not true, but is instead a pretext for [retaliation] (pretext alternative); or
- (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected [activity] (mixed-motive[s] alternative)"
- *Cothran v. Potter*, 398 Fed. Appx. 71, 74 (5th Cir. 2010) (citing *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010)).

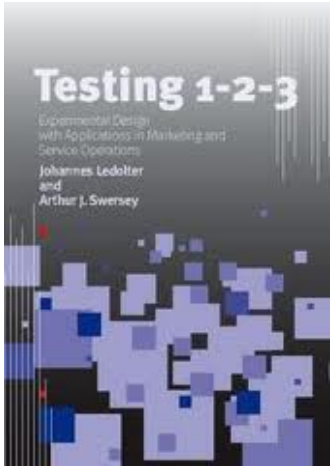
(1) Pretext Alternative

- How Does the Plaintiff establish pretext?
- "[B]ut for the protected activity, the adverse employment action would not have occurred." *Gollas v. University of Tex. Health Sci. Ctr. of Houston*, 2011 WL 1834248, at *3 (5th Cir. May 12, 2011); *accord Strong v. University Healthcare Sys., LLC*, 482 F.3d 802, 806 (5th Cir. 2007) ("The proper standard of proof … [for] a Title VII retaliation claim is that the adverse employment action … *would not have occurred 'but for' [the] protected conduct*."). *Id.* (quotation omitted) emphasis in original)

(2) Mixed Motive Alternative

- While the pretext alternative still exists, the Fifth Circuit in *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010) provided another alternative to plaintiffs: **the "mixed-motive" theory**
- Under this theory, an employee must only show that illegal retaliation was one of the reasons for the adverse action. *Smith*, 602 F. 3d at 333.
- If successful, the Defendant may defend the action by establishing that "it would have made the same decision even without consideration of the prohibited factor" *Id.*

(2) Mixed Motive Alternative (cont'd)



- (1) "If the plaintiff shows that the plaintiff's protected activity was a motivating factor, then
- (2) "the burden shifts to the employer to show that the adverse employment decision would have been made regardless of the retaliatory animus." *Cothran v. Potter*, 398 Fed. Appx. 71, 74 (5th Cir. 2010) (internal citation omitted).
- (3) If the employer meets its burden, the plaintiff's relief may be limited to injunctive and declaratory relief, costs, and attorney's fees. *Smith v. Xerox Corp.*, 602 F.3d 320, 327 n.13 (5th Cir. 2010). This is an issue that will be resolved in future litigation

Case Law Example

- *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010).
- Affirmed jury verdict in retaliation case even though plaintiff was on PIP before she filed her EEOC charge and was terminated after she failed to fulfill the PIP.

Case Law Example

- What were the problems for the employer in that case?
  - 22 year employee
  - Two years before termination the employee was awarded the President's Cup for top level performance
  - New manager who allegedly immediately decreased her sales territory, and then set unrealistic expectations
  - Just days after the employee's EEOC charge, he nitpicked and wrote her up over tiny issues, in violation of company policy. Even the HR manager agreed that it looked suspiciously like retaliation

Case Law Example (cont'd)

- What were the problems for the employer in that case?
  - Signed termination form before they received the final revenue numbers reflecting her sales performance (to determine if she satisfied the PIP).
  - Manager a gruff "hard-ass."
  - Manager sent e-mail to coworkers telling them not to help plaintiff – and inadvertently copied the plaintiff with it – then unsuccessfully tried to recall the message.

Take Away Lessons For Employers

- Don't let managers nitpick on the heels of a protected complaint.
- Don't start the termination process until it is a 100% done deal.
- Be especially careful with long-term employees with a good work history. *See also Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992) (affirming verdict for long-term plaintiff in a retaliation case).

TCHRA – Is Mixed Motive Alternative Available?

- In 2004, the Fifth Circuit indicated that it was "but for" causation only. *Pineda v. UPS, Inc.*, 360 F.3d 483, 487-88 (5th Cir. 2004) ("[Plaintiff] must show that "but for UPS's discriminatory conduct he would not have been fired").
- Last reported Texas case was *Ptomey v. Texas Tech Univ.*, 277 S.W.3d 487, 497 & n.11 (Tex. App. Amarillo – pet. denied 2009) (using "but for" causation and collecting cases regarding same).
- Note, however, that Texas courts are guided by analogous federal statutes and the cases interpreting them. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) (mixed motive in a discrimination case).
- Moreover, many Plaintiffs' lawyers argue that the *Toennies* "motivating factor" standard applies to any unlawful employment practice – including retaliation.

TCHRA Jury Instructions

- Broad form submissions present problems for employers
- Pattern instructions assume the employee engaged in protected conduct.
- e.g., "Did [company] discharge employee because of [employee's] [opposition to a disriminatory practice; making or filing a charge of discrimination; filing a complaint …"
- PJC 107.9

ADEA Retaliation

- "This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009)
- "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Id.*

Fifth Circuit Applies "But For" & *McDonnell Douglas*

- Cox v. DeSoto Cty., 407 Fed. Appx. 848 (5th Cir. 2011) (pet. for cert. pending) (ADEA retaliation case)
- "The *McDonnell Douglas* burden-shifting framework applies to retaliation claims." *Id.* at 850.
- "Ultimately, the employee must prove that the adverse employment action would not have occurred 'but for' the protected activity." *Id.* at 851.

Worker's Compensation Retaliation

- Also called a Section 451 claim
- A person may not discharge or in any other manner discriminate against an employee because the employee has:
  - (1) filed a workers' compensation claim in good faith;
  - (2) hired a lawyer to represent the employee in a claim;
  - (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A [the worker's comp. statute, TEX. LAB. CODE § 401.001, *et seq.*]; or
  - (4) testified or is about to testify in a proceeding under Subtitle A [the worker's comp. statute, TEX. LAB. CODE § 401.001, *et seq.*].
- TEX. LAB. CODE § 451.001.

How Plaintiffs Prove Their Claim

- To prevail, a plaintiff must establish a "'causal connection' between [his/her] discharge and the filing of a worker's compensation claim as an element of [his/her] *prima facie* case." *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996).
- "[E]mployee need not show she [or he] was fired solely because of filing the worker's compensation claim." *Lee v. Haynes & Boone, LLP*, 129 S.W.3d 192, 196 (Tex. App. – Dallas 2004, pet. denied).

How Plaintiffs Prove Their Claim (cont'd)

- "To prove a "retaliatory discharge" claim, the employee must show that the employer's action would not have occurred when it did had the employee's protected conduct—filing a workers' compensation claim—not occurred."
- "but for" causation
- *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005); *Green v. Lowe's Home Ctrs., Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)
- Link can be proven by circumstantial evidence

How Plaintiffs Prove Their Claim (cont'd)

- "Once the link is established, it is the employer's burden to rebut the alleged discrimination by showing there was a legitimate reason behind the discharge." *Arellano v. Americanos USA, LLC*, 334 S.W.326, 332 (Tex. App. – El Paso 2010) (no pet. h.) (citations omitted)

How Plaintiffs Prove Their Claim (cont'd)

- The burden is then the employee's to produce evidence raising a fact issue on whether the employer's stated reason "was a pretext for retaliatory action." *Arellano v. Americanos USA, LLC*, 334 S.W.3d 326, 332 (Tex. App. El Paso – 2011, no pet.)
- "[P]roof that the stated reasons for the discharge are false is sufficient to establish that the employee was terminated in violation of Section 451.001." *Arellano*, 334 S.W.3d at 331.

Circumstantial Evidence

- Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes:
  - (1) knowledge of the compensation claim by those making the decision on termination;
  - (2) expression of a negative attitude toward the employee's injured condition;
  - (3) failure to adhere to established company policies;
  - (4) discriminatory treatment in comparison to similarly situated employees; and
  - (5) evidence that the stated reason for the discharge was false.
- *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 451 (Tex. 1996).

Does This Law Bar An Employer From Applying A Neutral Absence Control Policy?

- No.
- The Texas Supreme Court has held that a plaintiff's workers' compensation retaliation claim fails, as a matter of law, if the employee was terminated pursuant to a reasonable and uniform absence control policy. *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388-89 (Tex. 2005); *Tex. Div. Tranter v. Carrozza*, 876 S.W.2d 312, 312-313 (Tex. 1994).
- Traditional "causal-connection" evidence, such as the expression of a negative attitude toward the employee's injured condition, is "immaterial if [the plaintiff's] termination was required by the uniform enforcement of [a] leave-of-absence policy." *See Haggar*, 164 S.W.3d at 388.

No bright line on such policies

- There is no bright-line rule for the amount of time that an employer must allow under its absence control policy. *See, e.g., Haggar*, 164 S.W.3d at 387 (no retaliation under a one year policy); *Carrozza*, 876 S.W.2d at 312 (no retaliation under a "three-day rule"); *Ramirez v. Encore Wire Corporation*, 196 S.W.3d 469, 472 (Tex. App.—Dallas 2006, no pet.) (no retaliation under a thirty-six day policy); *Polansky v. Southwest Airlines Co.*, 75 S.W.3d 99, 104 (Tex. App.—San Antonio 2002, no pet.) (no retaliation under a three year policy); *Baptist Memorial Healthcare System v. Casanova*, 2 S.W.3d 306, 307 (Tex. App.—San Antonio 1999, pet. denied) (no retaliation under a six month policy).
- The terminated plaintiff's retaliation claim fails, even if his violation of the absence control policy was due to his on-the-job injury. *See Cavender v. Houston Distributing Co., Inc.*, 176 S.W.3d 71, 72-72 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

WC Retaliation & Jury Instruction Issues

- The pattern does not use "but for" causation
- Instead it relies on "because of"
  - "Did [company] discharge [Plaintiff] because [he/she] filed a worker's compensation claim in good faith? …"
  - "There may be more than one cause for an employment decision."
- PJC 107.5

Tips For Employers To Avoid Workers' Comp. Retaliation Claims

- File the first report of injury or illness when the law requires you to -- every time. See *Burch v. City of Nacogdoches*, 174 F.3d 615, 623 (5th Cir. 1999) (relying on that evidence in dismissing claim)
- Send flowers, send a card, and visit employee when injured
- Don't speculate that employee is "faking" injury -- leave that up to carrier to decide
- Don't bemoan increase insurance costs

Tips For Employers To Avoid Workers' Comp. Retaliation Claims (cont'd)

- Don't create incentive whereby employees are discouraged to report on the job injuries.
- When sending termination letter to employee whose injury kept them away for so long that they are eventually terminated, emphasize (where appropriate) that they are encouraged to reapply in the future. *See, e.g., Oguezuonu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 588 (D. Md. 2005) (granting summary judgment against retaliation claim and relying on the fact that plaintiff's "termination letter invites her to reapply when she is able to return to work.").

Sox Retaliation News

- May 25, 2011 – DOL Administrative Review Board ("ARB") released *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123 (ARB May 25, 2011).
- The case rejected many of the tests that were previously employed to dismiss SOX complaints

Sylvester Case

- ARB determined:
  - 1. A SOX whistleblower complaint begins with OSHA, not the Federal Rules of Civil Procedure – therefore *Twombly* and *Iqbal* are inapplicable.
  - 2. Under the federal regulations that implemented SOX, there is "no particular form of complaint" and the complaining party must only provide "a full statement of facts and omissions, with pertinent dates, which are believed to constitute the violations [of SOX]."
  - 3. SOX complaints involve issues of motive and are fact-intensive, which do not promote early dismissal

Sylvester Case (cont'd)

- 4. A complainant need not demonstrate that an actual SOX violation occurred. Rather, the complainant must show the existence of an objective "reasonable belief" that the complained-of conduct violated SOX -- typically this will be a fact question
- 5. The employee does not need to communicate the reasonableness of his/her belief to others

Sylvester Case (cont'd)

- 6. So long as the employee "reasonably" believes that a violation is likely to happen, the employee is permitted to file a complaint without facing summary dismissal
- 7. Employee no longer has to complain of conduct that "definitively and specifically relates" to a violation of the fraud categories or security violations listed in SOX – this standard ignores the "reasonable belief" standard

Sylvester Case (cont'd)

- 8. ARB dismissed the trend in SOX case law dismissing whistleblower complaints that fail to allege all of the elements of a claim of security fraud: "[A] complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation."
- 9. The purpose of SOX is "to protect and encourage greater disclosure," including disclosure of both actual and *potential* fraud.

SOX: The Fifth Circuit Weighs In

- On June 23, 2011, the Fifth Circuit decided *Hemphill v. Celanese Corp.*, No. 10-cv-10746 (5th Cir. June 23, 2011) :
  - It affirmed summary judgment holding that Plaintiff failed to demonstrate that his protected activity was a contributing factor to his termination.
  - It also determined that, even if he had made such a showing, the employer provided "clear and convincing evidence" that it would have terminated his employment absent any protected activity.
    - It stressed that the employer conducted a thorough investigation;
    - The HR professionals who recommended his termination were unaware of his alleged protected activity;
    - The witnesses against the employee were not biased;
    - The actual decisionmaker simply accepted the unanimous recommendation

Bottom Line: Thorough Investigations Help

Bonus Tip: Remember the NLRA

- Employees are protected by the National Labor Relations Act even if they are not represented by a union and even if they do not engage directly in union activities.
- Section 7 of NLRA: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection*...

Examples of Protected Concerted Activities

- Employees' right to protest a poor manager (*Trompler*).
- Expressing group concerns and/or acting with the endorsement of other workers (*Timekeeping Sys., Inc.*).
- Actions regarding work hours, wages, terms of pay, and other work conditions (*Main Street*).

Examples of Protected Concerted Activities

- Right to fraternize so as to discuss terms and conditions of employment.
- *See Guardsmark LLC v. NLRB*, No. 05-1216 (D.C., Feb. 02, 2007) (employer's work rule prohibiting coworker fraternization violated Section 7 of the NLRA because employees would reasonably believe the rule prohibited employees from discussing the terms and conditions of employment).

Many Statutes Have anti-retaliation components

- Many statutes, like the FLSA, or even a Texas case law exception – like *Sabine Pilot* are not covered in this presentation, but lawyers and employers should beware

THE END

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9601 Jones Road, Suite 250
Houston, Texas 77065
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scott@fiddlerlaw.com

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