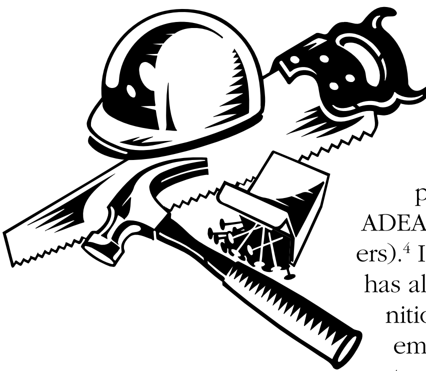
MICHAEL NEWMAN AND FAITH ISENHATH

Fidelity and Retaliation

One of the most pervasive topics in the field of labor and employment law is that of retaliation claims. The U.S. Supreme Court has recently heard and decided several cases on that specific topic, and the number of cases involving retaliation being filed has increased dramatically over the past 10 years.[1] In 1997, the Equal Employment Opportunity Commission (EEOC) reported that, of the 80,680 total charges of discrimination filed that year, 18,198 included an allegation of illegal retaliation.[2] Ten years later, in 2007, the agency reported that the total number of charges filed with the EEOC had increased by only 2.6 percent (to 82,792), but the number of charges including a retaliation claim rose from 18,198 to 26,663—an increase of 46.5 percent. This increase is significant and illustrative of a growing trend in employment discrimination cases.

There are many reasons for the recent upturn in the number of retaliation allegations included in EEOC charges and as pled as causes of action in private lawsuits. First, a substantial number of statutes now include provisions prohibiting retaliation against individuals who attempt to seek enforcement of the statutes' substantive provisions.[3] In fact, it appears that such provisions have become a cornerstone of legislative architecture in most statutory schemes to address specific problems—both in the workplace and outside of it. Second, even when causes of action alleging retaliation are not expressly established in statutory language, the Supreme Court has recently exhibited a willingness to read such a provision into a mere prohibition of "discrimination" (for example, in § 1981 complaints and the provisions of the ADEA applicable to federal employers).[4] In addition, the Supreme Court has also recognized an expanded definition of what constitutes an "adverse employment action"—including virtually any action that could have an effect on an employee—thus increasing the scope of what is prohibited by retaliation provisions generally.[5]



Finally, and perhaps most important, retaliation claims have become more prevalent, partly because a plaintiff may be able to prevail on a claim of retaliation despite the fact that his or her underlying claim of discrimination is unsuccessful.[6] In other words, if an employee complains of alleged gender discrimination and is subsequently fired, the fact that the gender discrimination complaint was not legally sufficient for recovery will not necessarily prevent that employee from recovering based on his or her retaliation claim. As will be illustrated below, all that is required is for the employee to have an "objectively reasonable" belief that actionable discrimination has occurred.

The general test that federal courts apply when analyzing a claim of retaliation is typical of the test used for discrimination claims as a whole. First, the employee-plaintiff must establish a prima facie case of retaliation. The plaintiff can do so by producing evidence showing the following: (1) the employee engaged in protected activity, (2) the employee was the subject of an adverse employment action, and (3) the adverse employment action was causally connected to the employee's protected conduct. If the plaintiff-employee is successful in establishing a prima facie case of retaliation, the burden of production shifts to the defendant-employer, who must come forward with a legitimate, nondiscriminatory reason for the adverse employment action that is alleged to have been retaliatory.[7] Finally, if the employer produces such evidence, the employee is given the opportunity to show that the employer's proffered reason was, in fact, a pretext for illegal retaliation.

The first element of the plaintiff's prima facie case has been the subject of additional attention recently: several federal courts have addressed the question of what, precisely, constitutes "protected activity." In fact, a recent decision by the Seventh Circuit acknowledged the existence of a circuit split on a specific aspect of this issue that should be illustrative of the larger debate on the subject.[8]

In *Tate v. EMS Inc.*, the Seventh Circuit applied the established standard for what constitutes protected activity—that the plaintiff must show that he reasonably believed in good faith that the practice he opposed violated the law—in the context of an employee who rebuffed his supervisor's sexual advances and was subsequently terminated. The Seventh Circuit held that Tate had not engaged in statutorily protected activity because his act of turning down his supervisor's demands was not based on any belief (reasonable or otherwise) that her advances were illegal, but rather were motivated by other factors.

The *Tate* case involved Alshafi Tate, who was hired by Executive Management Services to clean office buildings in Indianapolis. According to Tate, within a week or so of starting work, he and his female supervisor began engaging in consensual sex on a regular basis, and he promptly received a promotion and a raise. Tate got married the following August and, according to his testimony, he informed his supervisor in October that he had decided to end their relationship. However, when Tate attempted to end the relationship, his supervisor allegedly informed him that she expected their affair to continue and that, if it did not, he would lose his job. Despite these threats, Tate persisted in his desire to discontinue their relationship. Tate was subsequently terminated, although the supervisor and the company asserted that his termination was the result of Tate's belligerent refusal to perform a work-related assignment. Tate subsequently filed a lawsuit alleging both sexual harassment and retaliatory discharge, and the matter proceeded to trial. The jury returned a verdict in Tate's favor on his retaliation claim but found against him on his sexual harassment claim. The employer then filed a post-trial motion for judgment as a matter of law with respect to the retaliation claim, arguing that Tate had not engaged in protected activity—he had merely informed his supervisor that he would not continue to engage in sexual relations with her to keep his job. The district court denied this motion, but it was appealed to the Seventh Circuit Court of Appeals.

In analyzing the employer's appeal, the Seventh Circuit set forth the statutory framework of a retaliation claim, holding that "Title VII provides that 'it shall be an unlawful employment practice for an employer … to discriminate against any individual … because he has opposed any practice made an unlawful employment practice by [Title VII]," and citing the above-cited standard for analyzing a plaintiff's prima facie case.[9] Further, the court held that "[i]n order for [the plaintiff] to have engaged in protected conduct, he does not have to prove that [his supervisor] sexually harassed him … [only that] he 'reasonably believed in good faith the practice [he] opposed violated Title VII.'" The court recognized that there appeared to be a split among the circuits on this issue, with the Fifth Circuit's case law indicating that "a single, express rejection of sexual advances does not constitute 'protected activity' for purposes of a retaliation claim," and the Eighth Circuit's authority standing for the proposition that such a rejection constitutes "the most basic form of protected conduct."[10]

Based on the evidence before the court in this case, the Seventh Circuit sided with the Fifth Circuit on this issue, stating that there was "simply no evidence in the record that [the plaintiff] believed that [his supervisor's] actions were unlawful," and thus, that he held no "objectively reasonable" belief that the supervisor's actions were illegal. The court relied heavily on the fact that "the only statements that [Tate] made to [his supervisor] were that they 'were not good with each other' and he 'was not messing with her anymore,'" and that such statements did not indicate that Tate believed he was being sexually harassed. The court did "not dispute that [Tate] protested about [his supervisor's] behavior; the problem is that he did not necessarily believe that her behavior was illegal at the time." According to the Seventh Circuit, without such a belief, Tate's actions were not complaints of harassment sufficient to constitute protected activity. "While there are no 'magic words' that a plaintiff must use in order to indicate that the supervisor's behavior is unlawful," the court held, "the record [is] devoid of any statements that indicate sexual harassment was at issue."[11]

In other words, the *Tate* court held that, in order for this type of refusal to constitute protected activity, the refusal must be premised on the illegal nature of the supervisor's activity, not the employee's desire to be faithful to his spouse or some other reason that is equally personal. Without that particular motivation, the case does not involve a complaint of harassment or discrimination but, rather, a mere rebuffing of the supervisor's advances, which, in the Seventh Circuit's view, does not carry the same legal force.

The court's actual holding in the *Tate* case, although likely to specifically apply to a limited number of factual situations, is also significant for its illustration of the approach federal courts take to resolving questions with respect to retaliation issues. The *Tate* decision signifies that, with respect to retaliation claims, it is likely that courts which interpret the limits of a cause of action alleging retaliation will be able to alter the effective scope of existing claims to a significant degree. For instance, the *Tate* court effectively restricted the scope of protected activity—and thus the scope of cases in which causes of action alleging retaliation are available—to situations involving an employee speaking out against a supervisor's conduct *because* the employee knows it to be unlawful. In cases such as *Tate*, in which the employee speaks out for different reasons and is unable to demonstrate that his or her behavior was motivated by the illegal nature of the supervisor's activity, a cause of action alleging retaliation does not exist.

In addition, because the law defining the precise scope of retaliation claims is largely judge-made and varies from circuit to circuit, the possibility that different federal courts will come up with different answers to this question greatly increases. For example, the *Tate* court itself recognized that it was following the Eighth Circuit's reasoning in this case and was declining to follow the Fifth Circuit's holding that an employee's rejection of a supervisor's sexual advances is "the most basic form of protected conduct."[12] It thus appears that it is unlikely there will be one unified and completely consistent body of federal law with

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respect to retaliation claims. These claims will continue to develop over time, and they merit close scrutiny by employment counsel. **TFL**

Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm, Dinsmore & Shohl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group, and is FBA's vice president for the Sixth Circuit. Faith Isenhath is an associate in the same department and a member of the FBA's Cincinnati-Northern Kentucky Chapter. They may be reached at michael.newman@dinslaw.com and faith.isenhath@dinslaw.com, respectively.

Endnotes

[1]*CBOCS West Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).

[2]EEOC Charge Statistics, FY 1997 through FY 2007, available at www.eeoc.gov/stats/charges.html.

[3]*See, e.g.*, 42 U.S.C. § 2000e (2008); 29 U.S.C. § 634 et seq. (2008).

[4]*See CBOCS West Inc.*, *supra*, note 1; *Gomez-Perez*, *supra*, note 1.

[5]*Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

[6]*Fine v. Ryan International Airlines*, 305 F.3d 746 (7th Cir. 2002).

[7]*See, e.g.*, *LeMaire v. State of Louisiana*, 480 F.3d 383 (5th Cir. 2007).

[8]*Tate v. Executive Management Services Inc.*, No. 07-2575, 2008 U.S. App. LEXIS 21193, at *10 (7th Cir. Oct. 10, 2008).

[9]*Id.* at *9; 42 U.S.C. § 2000e-3(a) (2008).

[10]*Id.* at *10; *LeMaire*, *supra*, note 7; *Ogden v. Wax Works Inc.*, 214 F.3d 999 (8th Cir. 2000).

[11]*Tate*, *supra*, note 8 at *11-13, n.8.

[12]*Ogden*, *supra*, note 10.

Federal Bar Association Membership Application

TFL 1-09

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Signature of Applicant *Date*

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