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Retaliatory Personnel Action – Part Three: What constitutes employer retaliation?

Contents

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❖ Introduction

Part One addressed various statutory remedies for retaliation. Part Two focused on retaliation for reporting one's coworkers. Part Three, the final portion of this article, looks at what courts or juries have found to constitute actionable retaliation, and the appropriate remedies.

Not every denial of a request or a verbal slight rises to the level of a materially adverse personnel action. In the past, supervisors and management have punished people by assigning them unpleasant tasks or transferring them to undesirable locations. If there is no change in pay or benefits, courts are reluctant to intervene in the daily management of an agency.

❖ **Types of actions**

• ***Performance ratings & blacklisting***

The Seventh Circuit rejected the claims of a DHS employee who had brought a retaliation lawsuit. The panel said that "lower performance ratings are not actionable unless they are accompanied by tangible job consequences."

Moreover, even if the lower rating prevented the plaintiff from receiving a merit bonus, it was not enough to constitute a materially adverse action. Lapka v. Chertoff, #06-4099, 517 F.3d 974, 2008 U.S. App. Lexis 4391 (7th Cir. 2008).

If, however, negative ratings are part of a larger pattern of other misconduct, or they follow a statutory wrong, they will be recognized as compensable. For example, an Illinois State Police sergeant alleged that she was sexually harassed by her supervisor.

After her complaint, she received negative performance ratings and was given inferior work assignments. A federal jury awarded her $146,000, and she sought an award of attorney's fees. The parties engaged in a post-verdict settlement conference and concluded the litigation. Storey v. Illinois State Police, #4:05-cv-04011, 2 (10) Federal Jury Verdict Rptr. 8 (S.D. Ill. 2006); prior rulings at 2006 U.S. Dist. Lexis 8127 and 57970.

The Tenth Circuit rejected claims brought by state correctional officers who had complained that management had denied them due process and equal protection of the laws by "blacklisting" employees who had filed administrative appeals of personnel actions, resulting in them not being considered for promotions and other opportunities.

The three-judge panel found that the employees lacked a protected property interest in being considered for employment opportunities and they retained their rank and salaries. Teigen v. Renfrow, #06-1283, 511 F.3d 1072, 2007 U.S. App. Lexis 29854 (10th Cir.).

• ***Unfriendly behavior***

The Fifth Circuit rejected claims raised by a former prison nurse. Allegations of unfriendly behavior, being reprimanded in front of coworkers, unpleasant work meetings, and unfair treatment did not constitute adverse employment actions. The District Court had admonished the plaintiff for "throwing so many allegations at the defendants with the hope

that perhaps something might stick." King v. Louisiana Dept. of Public Safety & Corrections, #07-31069, 294 Fed. Appx. 77, 2008 U.S. App. Lexis 20294 (5th Cir.).

- The Supreme Court has said that "petty slights or minor annoyances that often take place at work and that all employees experience" are not actionable. Burlington N. & Santa Fe Ry. v. White, #05-259, 548 U.S. 53 at 68 (2006).

Reiterating that language, the Eighth Circuit rejected a retaliation action brought by a woman corrections officer. Personality conflicts and snubs by coworkers are not actionable. Sutherland v. Missouri Dept. of Corr., #08-3000, 2009 U.S. App. Lexis 20056 (8th Cir.).

• ***Reassignments and transfers***

The D.C. Circuit has held that a lateral transfer, even to a very undesirable assignment, is not an adverse employment action without a diminution in pay or benefits. The panel rejected the complaint of a woman correctional officer who claimed retaliation shortly after she had filed a sexual harassment claim. Jones v. Dist. of Col. Dept. of Corr., #04-7181, #04-7181, 429 F.3d 276, 2005 U.S. App. Lexis 24523 (D.C. Cir. 2005), affirming 346 F.Supp. 2d 25 (D.D.C. 2004).

The Fifth Circuit has held that relocating an employee's desk in the police station after she had complained of sexual harassment was not an adverse employment action that would support a retaliation claim. McCullough v. Kirkum, #06-30481, 212 Fed. Appx. 281, 2006 U.S. App. Lexis 31335 (5th Cir. 2006).

A panel of the Seventh Circuit held that changing an employee's work schedule might be an "adverse employment action" for purposes of a retaliation suit, even where the salary and duties are unchanged. Washington v. Illinois Dept. of Revenue, #03-3818, 420 F.3d 658, 2005 U.S. App. Lexis 17977 (7th Cir. 2005).

In that case, her work schedule was changed from 7-to-3 to 9-to-5, which caused her to take unpaid leave to care for her son, who suffers from Down syndrome (lowered cognitive ability, often resulting in developmental disabilities). Judge Easterbrook wrote:

> "Catbert, the 'Evil Director of Human Resources' in the comic strip Dilbert, delights in pouncing on employees' idiosyncratic vulnerabilities. Perverse cleverness that is funny

when limited to newsprint readily could be seen as discrimination when used to discomfit real people."

The record, he wrote, suggests that her superiors may have resorted to work-changes that would be harmless to most people but "do real damage to select targets."

- *Point of evidence***:** Unlike a hostile workplace environment claim, minor acts cannot be combined with older events to create a continuing pattern of retaliation. O'Connor v. City of Newark, #05-2237, 440 F.3d 125, 2006 U.S. App. Lexis 6050 (3rd Cir. 2006), relying on National Railroad Passenger Corp. v. Morgan, #00-1614, 536 U.S. 101 (2002). The plaintiff, a lieutenant, claimed retaliation for his cooperation in a federal corruption probe.

- *Arbitration***:** Arbitrators are not bound by court decisions that define what a material adverse action is. For example, an arbitrator overturned an involuntary transfer that occurred immediately after a lieutenant indicated that he was going to file a grievance challenging a schedule change. The grievant had minor performance problems, but the timing is what persuaded the arbitrator. City of Reno and Reno Police Employees, 125 LA (BNA) 158 (Staudohar, 2008).

• ***Fitness for duty evaluations***

Another form of retaliation is ordering an employee to submit to the indignity of a psychological fitness evaluation. Generally, there is no monetary loss for cooperating in an unnecessary procedure, because it is "on the clock" time. It is another matter when the employee is wrongly terminated for psychological unsuitability.

The Sixth Circuit affirmed a liability award against a city over the wrongful termination of two women police officers who were found psychologically unfit for service. The jury awarded each of the plaintiffs $2.5 million -- $1 million in compensatory damages, $223,080 in back pay and $1,276,920 in front pay. The trial court then reduced the compensatory damages from $1 million to $350,000.

The appeals court panel affirmed the reduction of damages decision. Denhof v. City of Grand Rapids, #05-1819, 494 F.3d 534, 2007 U.S. App. Lexis 5605, 2007 FED App. 0163N (Unpub. 6th Cir.).

- *Note*: IACP Police Psychological Services Section has published Psychological Fitness-for-Duty Evaluation Guidelines.

❖ Mixed motive cases

From a management perspective, discovering an independent reason to terminate or discipline a troublesome worker often provides an impenetrable defense to a claim or lawsuit. In the case of "after-acquired" information, the independent reason limits the amount of back pay an employee can recover even if retaliation is proved. (1)

The leading authority on this concept is Price Waterhouse v. Hopkins, #87-1167, 490 U.S. 228 (1989). In that case, the plaintiff claimed that her gender played a part in an unfavorable employment decision. The Supreme Court held that an employer may avoid liability by proving that management would have made the same decision, even if they had not considered the plaintiff's gender.

In a Georgia case, a federal appeals panel found that there were valid, independent reasons to terminate a police officer's employment.

The city produced evidence that the officer was terminated for five nondiscriminatory reasons. Even if management was retaliating against him because of his participation in a sexual harassment investigation, he failed to show that the city's reasons for discharging him were pretextual. The city would have discharged him even if the investigation was not a factor. Crawford v. City of Fairburn, #06-13073, 482 F.3d 1305, 2007 U.S. App. Lexis 7245 (11th Cir.).

- ***Caution*:** Raising additional reasons to terminate or discipline an employee is sometimes hazardous. If the additional reasons appear petty or frivolous to a jury, it might respond with inflated damages, including punitive relief.

❖ Remedies

Lawsuits typically translate injuries into money. Except for cases where injunctive relief is appropriate, the judicial system can do little else.

In south suburban Chicago, a former police commander won $3.7 million in his whistleblower retaliation lawsuit brought against the chief and mayor – including $2

million in punitive damages. In 2002, he alleged that the mayor and police chief set out to destroy him after he and five others reported alleged corruption to the Cook County State Attorney's office.

The plaintiff had testified at a grand jury that drugs, guns and money had vanished from the police evidence room. He also accused the chief of skimming cash that was going to officers for their off-duty security work.

The lawsuit also alleged that a woman from the village had warned him that the chief had offered her "presents" to fabricate a sexual assault claim against him. The alleged vendetta caused him panic attacks and depression and he was later granted a disability pension.

The federal jury awarded him $1,767,497 in compensatory damages against the village and $1 million in punitive damages against the police chief. The court later reduced the punitive recovery to $90,000, representing a year's salary of the chief. Hare v. Zitek, #1:02-cv-03973, PACER doc. # 186-7 & 244 (N.D. Ill. 2006).

The Ninth Circuit affirmed liability and an award of punitive damages in a case where the county's only black deputy sheriff was fired after he complained of profiling. Although he had more than four years of service as a sergeant-criminal investigator in the Army and nearly two years as a police officer in a Portland suburb, his ratings were downgraded to substandard.

After three weeks of testimony, a jury of eight whites and one black awarded him $850,000 against the county, $250,000 against the sheriff and $10,000 against each of six white officers that testified against him. The county subsequently agreed to pay the plaintiff $1.5 million from its risk management fund. Bell v. Clackamas Co., #01-35508, 341 F.3d 858, 2003 U.S. App. Lexis 17041 (9th Cir. 2003).

In some cases, damages are not the principal motive for commencing a lawsuit, such as when a plaintiff wants to be reinstated to a previous assignment or work period. In other cases, a jury might award a plaintiff only a dollar in damages, for various reasons.

In a recently decided action, a police officer alleged that management failed to promote or transfer him after he lodged a complaint against a sergeant for making racially insensitive remarks. The jury found in favor of the officer on his retaliation claim, but only awarded $1 in damages.

After the verdict, the officer argued that since the jury found that he suffered emotional pain and mental anguish, the jury erred by awarding only $1. He contended that the award of nominal damages cannot be reconciled with the jury's finding of actual injury, and sought a new trial limited to damages.

The court disagreed, and noted that a jury could agree with his allegations but also find that he failed to prove actual injury – and therefore was not entitled to compensatory damages. Babby v. City of Wilmington Dept. of Police, #06-552, 614 F. Supp. 2d 508, 2009 U.S. Dist. Lexis 29060 (D. Del.).

Notes:

1. For a more extensive discussion of after-acquired evidence, see Part One, pp. 206-207.

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