20TH ANNUAL
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Risky Business: The Employer Counterclaim Against the Employee Claimant

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Overview

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- Most workplace lawsuits are brought by employees against employers. Aside from cases involving noncompete clauses, trade secrets and similar confidentiality concerns, the focus of most employer-employee litigation is whether the employer is liable and, if so, the amount of damages to which the employee is entitled.

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- When an employer is confronted with a lawsuit by an employee (or former employee), the employer frequently wants to "fire back" with counterclaims of its own. While that may give the employer short-term gratification, in the long-run, it may be an extremely unwise decision.
- Most employment law litigators would agree that an employer should proceed with great caution before initiating legal action against an employee who has sued the company. The risks may far outweigh the benefits.

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Overview

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When a client/employer asks its attorney whether or not to file a counterclaim (or separate litigation) against an employee who has sued the company, several important questions need be addressed:

- "Why now?"
- "Why wasn't it pursued earlier?"
- "How compelling is our counterclaim on the facts and the law?"
- "Does it have to be a counterclaim; can it be asserted as an affirmative defense?"

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Overview of Retaliation Under the EEO Laws

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- The Equal Employment Opportunity ("EEO") Laws, Title VII Fair Labor Standards Act ("FLSA"), the ADEA , the ADA , the Family and Medical Leave Act ("FMLA") , and the Equal Pay Act ("EPA") each contain anti-retaliation provisions prohibiting employers from retaliating against employees who participate in employment discrimination procedures or who oppose unlawful employment practices. Numerous other federal statutes that protect employees' health and safety also prohibit retaliation.
- In addition, many states including Texas, have enacted a counterpart to Title VII which expressly prohibits retaliation based on various protected activities. Generally, the type of employer behavior that gives rise to a claim for retaliation and the corresponding preventive measures are the same regardless of the statute involved. Therefore, while discussion is generally focused on claims brought under Title VII, the FLSA, the ADEA, it is equally relevant to claims arising under similar statutes.

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Elements and Proof of Retaliation

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- In those instances where courts have considered whether the filing of a counterclaim or separate litigation constitutes an act of retaliation, the courts typically do not find there is direct evidence of discrimination.
- As such, the majority of claims are premised on circumstantial, non-direct, evidence of retaliation. The familiar *McDonnell Douglas* burden-shifting framework applies to their retaliation claims.

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- An employee must establish a *prima facie* case by showing: (1) he or she engaged in a protected activity; (2) the employer subjected him or her to an adverse employment action; and (3) a causal link between the protected activity and the employer's action.
- After an employee has established a *prima facie* case of retaliation, the burden shifts to the employer to proffer evidence, that if believed, would constitute a legitimate, nondiscriminatory reason for the adverse employment action.
- If the employer meets this burden of production, the presumption of retaliation created by the *prima facie* case disappears and the burden of persuasion shifts back to the employee to prove that the employer's articulated reason was merely a pretext for retaliation.

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Supreme Court Decisions Impacting Litigation As Retaliatory Conduct

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Bill Johnson's Restaurants, Inc. v. NLRB. (1983)

- In *Bill Johnson's Restaurants*, the Supreme Court addressed whether the NLRB could issue a cease-and-desist order to halt an allegedly retaliatory lawsuit filed by an employer in state court against employees who were exercising their rights under the NLRA. The Supreme Court noted that, "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation."

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- But, the Court noted, "[t]here are weighty countervailing considerations, however, that militate against allowing the Board ... to enjoin prosecution ... we recognize that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."
- As such, the Court held that, '[t]the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [NLRA]."

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- As will be discussed below, many courts continue to follow the Supreme Court's holding in *Bill Johnson's Restaurants* when analyzing whether an employer's separate lawsuit or counterclaim against an employee asserting a discrimination claim constitutes actionable retaliation. Those courts that follow the reasoning in *Bill Johnson's Restaurants* generally limit actionable retaliation claims to lawsuit or counterclaims that have no basis in law or fact.

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