Winning the Battle, Losing the War
The Law of Retaliation

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Introduction

That certain activity needs protection from retaliation should come as no surprise. Even biblical admonitions, "an eye for an eye, and a tooth for tooth," reflect man's tendency to strike back when he feels attacked. That response unfortunately often emerges when the "attack" only involves an individual taking advantage of legislatively granted rights, such as filing a charge of discrimination, or reporting on someone else's misdeeds.

Overview

The law of retaliation is deceptively simple, with most cases following a similar analytical framework. In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community. Affairs v. Burdine,* 450 U.S. 248 (1981) the Supreme Court created a burden shifting analysis for discrimination cases under Title VII where, as is usually the case, there was no direct evidence of discrimination. This analytical model has been adopted for retaliation claims regardless of the court or the statutory basis for the protected activity. Under the *McDonnell Douglas* model is that plaintiff must initially establish a prima facie case. The elements of a prima facie case are generally described as engagement in protected activity, an adverse employment action and a causal connection between the two. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate reason for its action. Assuming that burden is met, the burden shifts back to the employee to establish that the articulated reason is pretextual and that the retaliation was the reason for the adverse employment action.

This analysis, although generally accepted is not without its critics, including Judge Richard Posner of the Seventh Circuit. Criticizing the use of a prima facie standard which contains a causation element, he notes that while it is "*McDonnell Douglas*-speak," it is out of place. He would find if the plaintiff has produced evidence he was fired for engaging in protected conduct he has gone beyond *McDonnell Douglas* and should be entitled to a trial unless the employer can produce uncontradicted evidence it would have fired the plaintiff anyway. *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F. 3d 640 (7th Cir. 2002).

In *Stone,* Judge Posner rejects the Fifth Circuit's (and others who adopt it) use of causation in the prima facie case as superfluous. (Judge Posner does concede that some courts including the Fifth Circuit have actually substituted a lesser standard of causation in the prima facie case, something akin to "were not wholly unrelated" rather than but-for causation which is the ultimate liability standard. That still does not alter his critical opinion.) Instead, in *Stone* the Seventh Circuit adopted two (and only two) ways for a plaintiff to obtain or prevent summary judgment in a retaliation case:

> One, the more straightforward, the one that is unrelated to *McDonnell Douglas*, is to present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a

> charge of discrimination) and as a result suffered the adverse employment action of which he complains. If the evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendant presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation. …
>
> The second route to summary judgment, the adaptation of *McDonnell Douglas* to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner. If the defendant presents no evidence in response, the plaintiff is entitled to summary judgment. If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment. Otherwise there must be a trial.

Id. at 644.

Another Circuit Judge would go even further, calling for the total rejection of the *McDonnell Douglas* analysis, citing among other things Judge Posner's opinion in *Stone* as, "[a] wonderful example of what the *McDonnell Douglas* framework can do to a good mind." *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1225 (10th Cir. 2003) (J. Hartz writing separately.)

Issues Related to the Prima Facie Case

A. Engagement in protected activity.

The starting point for a retaliation case is whether the plaintiff engaged in protected activity. Generally the protected activity is created by statute. When a statute provides for the exercise of a right, such as filing a charge of discrimination, almost always the same statute has an anti-retaliation provision to protect employees who avail themselves of that right. As the cases below show, strict compliance with the statutory language creating the protected activity is often critical and a frequent basis for a successful defense to the suit.

Anti-retaliation provisions cover two distinct types of activities. Protection of **participation** is a guarantee of access to the procedures set up to vindicate statutory rights. This means that employees discriminated against for filing a charge of discrimination on the basis of race, a complaint with the Department of Labor concerning the payment of minimum wages or overtime, or for testifying against an employer in a worker's compensation proceeding, would all be protected from retaliation under the participation provisions of the applicable statutes. The participation clause protects access to the enforcement mechanism.

Different is the protection provided employees who protest conduct made illegal by the statute. For example, an employee who complained about a fellow employee's termination because of their race, would be protected under the **opposition**, not participation clause of Title

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