RETALIATION IN EMPLOYMENT LAW UPDATE: OVERCOMING THE CHALLENGES OF DEFENDING RETALIATION CLAIMS, AND THE LATEST DEVELOPMENTS IN DODD-FRANK WHISTLEBLOWER SUITS

American Conference Institute's 6th Annual Forum on Defending and Managing Employment Discrimination Litigation
Friday, August 1, 2014

John D. Cole
Nexten Pruet, PLLC
227 West Trade Street, Suite 1550
Charlotte, NC 28202
T: 704.338.5351 / F: 704.805.4730
JCole@nexsenpruet.com

Michael W. Hawkins
Dinsmore & Shohl LLP
255 E. Fifth Street, Suite 1900
Cincinnati, OH 45202
T: 513.977.8270 / F: 513.977.8141
Michael.hawkins@dinsmore.com

Pearl Zuchlewski
Kraus & Zuchlewski LLP
500 5th Ave, Suite 5100
New York, NY 10110
T: 212 869 4646 / F: 212 869 4648
pz@kzlaw.net

I. Recent Case Law Impacting Elements of Retaliation Claims

a. What constitutes "protected activity?"

i. Title VII's anti-retaliation provision states that: "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. The "opposition" clause provides the broadest protection and includes conduct outside EEOC charges or court proceedings.

ii. The Fifth Circuit Court of Appeals held that making an internal report of sexual harassment to a manager could constitute protected activity. The plaintiff complained to her manager that two of her coworkers made sniffing noises and displayed physical arousal towards her. She was fired shortly after complaining about the conduct. The Fifth Circuit held that the fact that the men's behavior was not physical was not dispositive to whether the plaintiff had engaged in protected activity by reporting the incidents. Royal v. CCC&R Tres Arboles, LLC, 2013 U.S. App. LEXIS 23477 (5th Cir. Nov. 21, 2013).

iii. On the other hand, the Second Circuit Court of Appeals has concluded that participation in internal investigations into pre-charge harassment complaints does not constitute protected activity under the "participation" clause of Title VII. Townsend v. Benjamin Enterprises, Inc., 2012 U.S. App. LEXIS 9441 (2d Cir. May 9, 2012).

iv. The Seventh Circuit Court of Appeals recently held that a plaintiff did not engage in statutorily protected activity when he participated in an EEO investigation regarding the *plaintiff's own* alleged sexual harassment of a coworker. Vaughn v. Vilsack, 715 F.3d 1001 (7th Cir. 2013).

v. Some courts have held that employees do not engage in protected activity unless they show that they stepped outside their normal job role, because otherwise they could not signal to the employer that they are engaging in protected activity. See, e.g., Hagan v. Echostar Satellite, LLC, 529 F.3d 617 (5th Cir. 2008), Pettit v. Steppingstone, Center for the Potentially

Gifted, 429 Fed. Appx. 524 (6th Cir. 2007) (interpreting the FLSA retaliation provisions).

b. What constitutes an "adverse action?"

i. In 2006, the United States Supreme Court held in Burlington Northern v. White, 548 U.S. 53 (2006) that adverse actions are "not limited to discriminatory actions that affect the terms and actions of employment." Rather, the employee only needs to prove that the employer's action "might dissuade a reasonable worker from making or supporting a charge."

ii. Since 2006, several courts have ruled on the scope of this element.

iii. The Middle District of Tennessee held that it was an adverse action for the employer to disable an employee's office access, voicemail, and computer network access just hours after she complained about sex discrimination. EEOC v. Southeast Telecom, Inc., 780 F. Supp. 2d 667 (M.D. Tenn. 2011).

iv. A post-employment negative job reference (or refusal to give a job reference) can constitute an adverse action, according to the Tenth Circuit Court of Appeals. EEOC v. C.R. Eng., Inc., 2011 U.S. App. LEXIS 8971 (10th Cir. 2011).

v. The Eighth Circuit Court of Appeals held that it was an adverse action for a company to terminate an employee after she submitted a written complaint of discrimination, even though her termination was later rescinded. Young-Losee v. Graphic Packaging Int'l, Inc., 631 F.3d 909 (8th Cir. 2011).

vi. According to the EEOC Guidance Manual, an adverse action also includes denial of a promotion, denial of job benefits, demotion, suspension, or a negative performance evaluation.

vii. On the other hand, the Sixth Circuit Court of Appeals has found **no** adverse action where an employee's supervisor hid the employee's purse because it was unsecured and then took an abandoned recycle bin in order to "make a point" about the plaintiff's need to return bins directly to work. Kurtz v. McHugh, 423 Fed. Appx. 572 (6th Cir. 2011).

c. What constitutes "causation?"

i. Smith v. Isle of Capri Casinos, Inc., No. 4:13-cv-00060 (N.D. Miss. Jun. 5, 2014). A former restaurant runner's sexual harassment retaliation claim failed because she alleged that she was fired for refusing a chef's sexual advances, not for reporting them.

ii. What about temporal proximity? Courts are split on what length of time between protected action and adverse action is sufficient to establish the inference of retaliation. Some courts have held that times as short as seven days or two days is sufficient to establish temporal proximity, see Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 2013 U.S. Dist. LEXIS 175833 (W.D. Penn. Dec. 16, 2013) and Jalil v. Advel Corp., 873 F.2d 701 (3d Cir. 1989), whereas others have found that times as short as two or three months is too long. See Moore v. Shinseki, 555 F.3d 1369 (Fed. Cir. 2009) and Leboon v. Lancaster 503 F.3d 217 (3d Cir. 2007).

iii. University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (June 24, 2013).

1. The Plaintiff in Nassar brought a retaliation suit, claiming that he was denied permanent employment with the University of Texas Southwestern Medical Center after he alleged that a supervisor was discriminating against him based on his race and religion. The University argued that, regardless of any alleged retaliatory intent, it nonetheless would not have made the plaintiff a permanent employee for completely justifiable reasons. In other words, it argued that the plaintiff could not prevail because he could not show that he would have received a permanent position "but for" the retaliation. The Court was asked to clarify the standard of proof applied to retaliation claims—i.e., whether plaintiffs must prove only that the retaliation was a "motivating factor" or whether they must show that "but for" the illegal act, the plaintiffs' injury would not have occurred.

2. Previously, a plurality of the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), adopted the "motivating factor" test for, specifically, sex discrimination cases brought under Title VII. Under this test, if a plaintiff could show

that discrimination was a "motivating factor" in an employment action, the employer was required to show that it would have taken the same action regardless. Thereafter, this rule was codified, albeit modified, in 1991—"an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for employment practice, enough though other factors also motivated the practice." 42 USC § 2000e-2. Prior to this amendment, however, courts already were applying Price Waterhouse liberally to all Title VII claims, including retaliation claims. In 2009, however, the Supreme Court in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), held that the "but for" standard, not the "motivating factor" test, applied to retaliation claims brought under the Age Discrimination in Employment Act (ADEA). Gross led many to question what standard applied to Title VII retaliation claims—whether the "but for" standard applied to all retaliation claims or simply ADEA retaliation claims—and this ambiguity ultimately resulted in a split in lower court decisions.

3. The Court in Nassar addressed this ambiguity, holding that the "motivating factor" test only applied to "status-based" discrimination claims, not to retaliation claims. It first pointed to the language of the 1991 amendment, which specifically applied to "race, color, religion, sex, or national origin." Moreover, the Court pointed out that Title VII contains separate provisions for status-based discrimination and for retaliation, and that the 1991 amendment was only passed for the status-based provision. As a result, the Court also rejected any argument that retaliation is essentially a subset of discrimination claims, noting that, if that was the case, there would be no need to treat the two differently under Title VII. The Court ultimately pointed to the "ever-increasing frequency" of retaliation claims and concluded that placing a stricter "but for" standard of proof on retaliation claims made sense and would limit the employee's ability to concoct his or her own retaliation claims by making unfounded claims of discrimination in anticipation of getting terminated.

II. Impact of Nassar

a. Cases Finding For Employers

i. Mooney v. Lafayette County School District, 538 Fed. Appx. 447 (5th Cir. 2013). In Mooney, the Fifth Circuit Court of Appeals held that the plaintiff, a school teacher, had failed to show that her complaint of gender discrimination had any effect on the eventual termination of her contract. The court noted that under Nassar, "Title VII retaliation claims, under the language of the statute itself, must be proved according to traditional principles of but-for causation, not the lessened 'motivating factor' standard."

ii. Nicholson v. City of Clarksville, Tennessee, 530 Fed. Appx. 434 (6th Cir. 2013). In Nicholson, the United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of a Title VII retaliation claim, finding that a two-month gap between the plaintiff's filing of an EEOC charge and the adverse employment action, without more, was insufficient to discredit the employer's reason for the allegedly adverse employment action.

iii. Krzycki v. Healthone of Denver, Inc., No. 12-cv-00026-PAB-BNB (D. Colo. Jul. 25, 2013). The United States District Court for the District of Colorado granted the employer's motion for summary judgment on the plaintiff's Title VII retaliation claim, because the court found that the plaintiff failed to demonstrate that her participation in the sexual harassment investigation of a coworker was the but-for reason for her termination. The court found that the plaintiff did not prove that the employer's stated reason for her termination—that she was intimidating and unprofessional at work—was pretext demonstrating that her protected activity was the actual, but-for cause of her termination.

iv. Dall v. St. Catherine of Siena Medical Ctr., No. 11-CV-0444 (E.D. N.Y. Aug. 14, 2013). The United States District Court for the Eastern District of New York granted the employer's motion for summary judgment, even though the plaintiff was terminated just two days after filing a sexual harassment complaint. The court found that although temporal proximity was sufficient to show causation at the "prima facie stage," it was not sufficient to demonstrate pretext where the employer presented evidence that it was disciplining the employee for *how* he went about filing the

complaint, rather than the complaint itself. The employer presented evidence that he had intimidated coworkers into signing supportive statements.

b. Cases Finding for Plaintiffs

i. Hobgood v. Ill. Gaming Board, 731 F.3d 635 (7th Cir. 2013). In Hobgood, the Seventh Circuit Court of Appeals reversed the dismissal of the plaintiff's Title VII retaliation claims. The court found that retaliation could have been the but-for cause of the plaintiff's termination where the plaintiff helped a coworker file a discrimination charge in 2006 and the employer thereafter allegedly investigated the plaintiff in contravention of company policies, in an attempt to find a reason to fire the plaintiff.

ii. Bishop v. Ohio Dept. of Rehabilitation and Corrections, 529 Fed. Appx. 685 (6th Cir. 2013). The Sixth Circuit Court of Appeals applied the cat's paw theory of discrimination to reverse the grant of summary judgment for the employer, when the plaintiff produced evidence that a supervisor gave the plaintiffs a negative performance review just 34 days after they filed discrimination complaints, which the warden then relied upon when terminating the plaintiffs. Notably, the warden failed to conduct an independent investigation before terminating the plaintiffs' employment.

iii. Welch v. Eli Lilly & Co., No. 2:10-cv-00025-GEB-EFB (S.D. Ind. Aug. 15, 2013). The court denied the employer's motion for summary judgment on the employer's Section 1981 retaliation claims, because the court found the plaintiff produced evidence that she was terminated shortly after she complained, a supervisor commented to her "We got your black a-s now," and her supervisor referred to the plaintiff as "girlfriend" at her termination meeting." The court found that even under the more stringent standard applied in Nassar, the plaintiff's retaliation claims survived.

c. Application to Other Acts

i. Americans with Disabilities Act

1. In EEOC v. Evergreen Alliance Golf Ltd., No. CV 11-0662-PHX-JAT (D. Ariz. Aug. 21, 2013), the United States District Court for the District of Arizona followed Nassar to conclude that the

plaintiff in an ADA retaliation lawsuit must prove that the protected activity was the but-for cause of the employer's employment decisions.

ii. State Anti-Discrimination Laws

1. In Dall v. St. Catherine of Siena Medical Center, No. 11-CV-0444 (E.D. N.Y. Aug. 14, 2013), the United States District Court for the Eastern District of New York extended Nassar's but-for causation requirement to retaliation claims brought under the New York State Human Rights Law, finding that the language in the statute was the same as Title VII and the court had previously applied federal Title VII standards when interpreting the New York law.

2. However, in Reiber v. City of Pullman, No. 11-cv-0129 (E.D. Wash. Aug. 1, 2013), the United States District Court for the Eastern District of Washington declined to extend Nassar to retaliation claims brought under the Washington employment discrimination statute. Washington courts had previously applied the "motivating factor" standard to such claims, and the federal district court noted that, although it would decline to disturb the state courts' prior rulings, Washington state courts would likely need to revisit the applicable standard in light of Nassar.

iii. 42 U.S.C. § 1981

1. Welch v. Eli Lilly & Co., No. 2:10-cv-00025-GEB-EFB (S.D. Ind. Aug. 15, 2013). The court applied Nassar to the employee's Section 1981 retaliation claims to find that the plaintiff produced evidence that she was terminated shortly after she complained, a supervisor commented to her "We got your black a-s now," and her supervisor referred to the plaintiff as "girlfriend" at her termination meeting." The court found that even under the more stringent standard applied in Nassar, the plaintiff's retaliation claims survived.

III. Retaliation Claims Outside Title VII

a. In 2008, the United States Supreme Court held in CBOCS West, Inc. v. Humphries, 533 U.S. 442 (2008), that 42 U.S.C. § 1981 ("Section 1981"), which

prohibits contract impairment on the basis of race, encompassed actions for retaliation. Specifically, the Court held that the federal statute, enacted shortly after the Civil War, could be used to bring a claim of employment-related retaliation. The plaintiff, an assistant manager at a Cracker Barrel restaurant in Illinois, alleged that his termination was the result of (1) his race and (2) the fact that he complained to managers that an African American co-worker was also dismissed for racial reasons. Humphries sued Cracker Barrel under Title VII of the Civil Rights Act of 1964 and Section 1981. The trial judge granted summary judgment to Cracker Barrel on all of his claims, but the Seventh Circuit Court of Appeals reversed as to the district court's conclusion that Section 1981 did not encompass claims for retaliation.

b. The United States Supreme Court agreed. In doing so, it relied on four principles. First, it concluded that Section 1982, another Civil War era law protecting real property rights, had previously been found by the Court to prohibit retaliation. Second, Section 1981 and Section 1982 have consistently been interpreted similarly. Third, it noted that Congress passed legislation in 1991, and in doing so reversed an earlier Supreme Court decision and specifically declared that Section 1981 encompassed post-contract formation conduct. Fourth, it concluded that after the 1991 amendments, lower courts have consistently found that Section 1981 prohibits retaliation.

c. Justices Scalia and Thomas dissented vigorously, arguing that the text of Section 1981 made no reference to retaliation and that Congress failed to amend the law to include retaliation when it otherwise amended the law in 1991.

IV. Third-Party Liability in Retaliation Cases

a. Thompson v. North American Stainless, 131 S.Ct. 863 (2011). The Supreme Court extended retaliation protection to persons in the "zone of interest" of a person engaging in protected activity. In so holding, the Court found that the fiancé of a woman who filed an EEOC charge of discrimination could pursue a claim for retaliation when he was allegedly fired for his fiancée's protected activity.

b. After Thompson, some courts have declined to further extend the reach of the Court's holding. See Underwood v. Dept. of Fin. Servs. Fla., 518 Fed. Appx. 637 (11th Cir. 2013), declining to extend Thompson to cases when the spouses worked for different employers.

V. Overcoming the Difficulties in Defending Retaliation Claims

a. Overcoming Jurors' Preconceived Notions

i. Jurors often believe, prior to a trial, that it is natural to want to retaliate against an employee who has made allegations against an employer. To successfully defend retaliation claims, employers must paint jurors the full picture of the circumstances leading to the adverse action taken against the employee.

b. What the Jury Will Want to See that You Did Before Terminating a Prior Employee:

i. Draft clear policies that prohibit retaliation. They should state that the organization prohibits and does not tolerate retaliation. They should further advise employees to report any perceived retaliation using the same complaint procedure provided for harassment and discrimination complaints. They should make clear that those employees engaging in retaliation will be appropriately disciplined.

ii. Train managers and supervisors on how to respond to employee complaints. Management should be sensitive to employee complaints and should involve the Human Resources department as soon as such complaints are raised.

iii. Follow up with complainants when they complain of discrimination or harassment. Promptly and thoroughly investigate each complaint, and remind all employees involved of the company's anti-retaliation policy.

iv. Consistently apply discrimination, harassment, and anti-retaliation policies. Ensure that employees who have engaged in protected activity are afforded the same opportunities as those who have not complained.

v. Keep discrimination or harassment complaints and investigations confidential. If the decisionmaker to the adverse employment action was unaware of the plaintiff's protected activity, they will have a difficult time proving a causal connection between the protected activity and the adverse employment action.

vi. Obtain outside advice before taking adverse actions against an employee who has made a complaint. If the manager or supervisor is aware of the charge or complaint, he or she should consult with human resources, and possibly outside legal counsel, before taking disciplinary actions against an employee. This is especially important in the wake of Burlington Northern's expansion of what constitutes "adverse action."

vii. Prepare and retain contemporaneous supporting documentation for all employment actions. Juries are more inclined to give plaintiffs the benefit of the doubt over managerial personnel, so employers should be able to produce documented support for their employment decisions. Train managers to resist the temptation to artificially create a "paper trail" after a discrimination claim (e.g. suddenly and aggressively documenting all minor performance issues). Employees who are subject to greater scrutiny after protected activity may use that heightened scrutiny against the employer.

viii. When taking an adverse employment action against an employee who has previously engaged in protected activity, be honest about the reasons for taking the adverse actions. Do not tell the complainant that his position is being eliminated if he is really being terminated for poor performance.

VI. Effectively Proving that the Confidentiality of a Workplace Investigation is Justified

a. Confidentiality of workplace investigations has been the subject of some recent controversy. In 2012, the EEOC expanded a discrimination investigation to include possible retaliation charges, because the employer had a policy mandating that employees keep ongoing investigations confidential. The EEOC argued that its guidance provides that "*complaining to anyone, including high management, union officials, other employees, newspapers, etc., about discrimination is protected opposition. It also states that the most flagrant infringement of the rights that are conferred on an individual by Title VII's retaliation provision is the denial of the right to oppose discrimination."* Although the letter does not constitute binding law, it offered a glimpse into the EEOC's position on the balance between confidentiality and retaliation claims.

b. What this means for employers is that it is risky to implement broad policies mandating confidentiality of internal investigations, especially if those policies impose discipline on those who fail to keep the investigation and violation confidential.

c. Employers crafting enforceable confidentiality policies can start by drafting an anti-harassment and discrimination policy that clearly states what conduct is prohibited and communicates that employees who make complaints of harassment or discrimination will be protected against retaliation.

d. The policies should clearly describe the complaint process with accessible avenues for complaints. It should provide for a prompt, thorough, and impartial investigation, and if harassment or discrimination is found, should provide for appropriate corrective action.

e. The policies should suggest, without mandating, that employees keep investigations confidential. The employer should cite factors such as protecting witnesses, preserving evidence, and protecting the integrity of the process to encourage employees to keep the investigation confidential. Employees should not be disciplined for failing to abide by the confidentiality provisions.

f. The policies should also communicate to employees that the employer will, to the extent possible, ensure that the investigation stays confidential.

g. If an employer determines that a heightened confidentiality requirement is warranted in an investigation, the employer should carefully document the reasons for the confidentiality and should articulate the scope of the instruction necessary to justify the legitimate reason for the confidentiality. All documentation should be included in the investigation file.

VII. Latest Developments in Dodd-Frank Whistleblower Protection Litigation

a. Dodd-Frank Background

i. Section 922 of the Dodd-Frank Act applies to publicly traded companies and provides new incentives to whistleblowers. The incentives include provisions for bounties and anti-retaliation. The bounty provision gives whistleblowers between 10-30% of collected monetary sanctions for voluntarily providing original information to a successful SEC enforcement action that collects at least $1 million in sanctions. The anti-retaliation provision prohibits employers from taking adverse actions against a whistleblower who (1) provides information to the SEC; (2) initiates, testifies in, or assists in an investigation of the Commission related to such information; or (3) makes disclosures required under

Sarbanes-Oxley or the Securities Exchange Act or other rule or regulation subject to the SEC's jurisdiction.

ii. The Dodd-Frank Act defines a whistleblower as "any individual[s]…who provide[s] information relating to a violation of the securities laws to the [Securities and Exchange] Commission. Under the rules, a whistleblower includes employees, agents, and possibly persons outside the company who provide relevant information.

iii. The statute of limitations is 6 years from the date of the violation or 3 years after the employee should reasonably have known of the violation, but in any event no longer than 10 years from the violation.

iv. Successful litigants can recover reinstatement (plus seniority), twice the amount of backpay otherwise owed (plus interest), and compensation for litigation costs, including attorney's fees.

b. Recent Developments

i. Who is a Whistleblower?

1. Asadi v. G.E. Energy LLC, 720 F.3d 620 (5th Cir. 2013). In July of 2013, the Fifth Circuit Court of Appeals held that Dodd-Frank's whistleblower protections only extend to persons who report a potential violation to the SEC. The Fifth Circuit was the first appellate court to consider the question.

2. A handful of district courts have similarly held that Dodd-Frank only protects individuals who report potential securities violations to the SEC. For example, in Englehart v. Career Educ. Corp., No. 8:14-cv-444 (M.D. Fla. May 12, 2014), the United States District Court for the Middle District of Florida dismissed a career services director's whistleblower retaliation claim because she made internal reports of misconduct but never reported it to the SEC.

3. However, a growing number of courts have rejected Asadi to hold that initial reporting to the SEC is not a prerequisite for "whistleblower" status. This includes the Southern District of New York's rejection in Yang v. Navigators Group Inc., No. 13-cv-2073 (S.D. N.Y. May 8, 2014), in which the court concluded that

the Dodd-Frank whistleblower protection provisions were ambiguous. The court therefore deferred to the SEC's interpretation that a whistleblower need not report a potential securities law problem to the SEC. Similarly, the United States District Court for the District of Nebraska held in May that an employee who provided information to the Financial Industry Regulatory Authority qualified as a whistleblower even though he never reported potential misconduct to the SEC. Bussing v. COR Clearing LLC, No. 8:12-cv-00238, (D. Neb. May 21, 2014)

4. The Second Circuit Court of Appeals, which yields substantial influence in the interpretation of securities law, is expected to rule on the issue soon. It heard oral arguments in June of 2014 in the case of Liu v. Siemens AG, and one of the issues presented is whether an employee must report a violation to the SEC.

ii. What Must A Whistleblower Report?

1. Zillges v. Kenney Bank & Trust, No. 13-c-1287 (E.D. Wisc. June 4, 2014). The United States District Court for the Eastern District of Wisconsin dismissed the whistleblower allegations of a former bank executive because he protested potential violations of the Federal Deposit Insurance Act and Consumer Financial Protection Act, which, according to the court, did not pertain to *securities*. He alleged that his employer conspired to terminate him after he complained internally about the alleged violations. In holding that he failed to allege a violation of securities law, the court sidestepped the issue of whether the plaintiff qualified as a whistleblower when he never reported the noncompliance to the SEC.

2. Kramer v. Trans-Lux Corp., No. 3:11cv1424 (D. Conn. Sept. 25, 2012). Kramer was the first Dodd-Frank case involving whistleblower retaliation that survived the motion to dismiss stage. At issue in Kramer was whether whistleblower protection extended to individuals who were required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, or any other law, rule or regulation subject to the SEC's jurisdiction, regardless of whether the disclosure was done in the manner required by the SEC. According to the District of Connecticut, the

answer was yes, and the court declined to dismiss the plaintiff's claims, even though he did not report information to the SEC in the specific manner provided by Dodd-Frank.

c. Other Developments

i. In October of 2013, the SEC awarded $14 million to an anonymous SEC whistleblower.

ii. In June of 2014, the SEC brought its first case under the whistleblower retaliation provision of Dodd-Frank. In the suit, the SEC alleged that Paradigm Capital Management, Inc. and Paradigm's owner, Candace Weir, engaged in transactions prohibited by the SEC, then retaliated against an employee who reported the transactions to the SEC. The plaintiff brought suit after he allegedly informed the SEC that his employer was engaging in a prohibited transaction and was relieved of his day to day responsibilities the next day. The whistleblower eventually resigned after he never returned to his initial duties. The SEC brought suit, citing several allegedly adverse employment actions which it viewed as retaliation, including removing the whistleblower from his position, tasking him with investigating the conduct he had reported, and stripping him of his supervisory duties. The parties settled both the whistleblowing and the retaliation claims for $2.2 million. The company denied wrongdoing but agreed to cease and desist from committing future violations of the Securities Exchange Act and Investment Advisers Act.

VIII. Update on Sarbanes-Oxley Litigation

a. Sarbanes-Oxley Retaliation Provision

i. Section 806 of the Sarbanes-Oxley Act of 2002 protects employees of publicly traded companies who provide information, assist in an investigation, or report what the employee "reasonably believes" to be a violation of the Securities and Exchange Act or any provision of federal law relating to fraud against shareholders.

ii. Whistleblowers must first file a complaint with the Secretary of Labor within 180 days after the date of the violation, or the date on which the employee becomes aware of the violation, whichever is later.

iii. Successful litigants can recover reinstatement, back pay, and other compensatory damages, including attorney's fees.

b. Subcontractors of Publicly Traded Companies are Protected by SOX Retaliation Provisions: Lawson v. FMR LLC

i. In Lawson, the United States Supreme Court held that employees of subcontractors of publicly traded companies are protected by SOX's anti-retaliation provisions. The provision at issue stated that:

> *No [public] company … or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee … to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders ….*

ii. The employee plaintiffs worked for a worked for a private mutual fund investment company that performed work for FMR LLC ("Fidelity"), a publicly traded company with no employees. They alleged that they were retaliated against when they allegedly reported SOX violations to their employer. Fidelity argued that SOX only protected employees of publicly traded companies, and that the plaintiffs, who worked for private entities, were precluded from bringing a retaliation suit.

iii. The Supreme Court's decision resolved a circuit split between the First Circuit Court of Appeals and the ARB. The First Circuit had previously dismissed the plaintiff's suit, agreeing with Fidelity that SOX only protected employees of publicly traded companies. On the other hand, various Administrative Review Board decisions had acknowledged that employees of private subcontractors to publicly traded companies could bring whistleblower retaliation suits under SOX.

iv. In holding that the plaintiffs were entitled to bring suit under SOX, the Court stated that "nothing in § 1514A's language confines the class of employees protected to those of a designated employer." The Court also noted that including employees of contractors and subcontractors would further Congress's goal of encouraging outside professionals to report fraud without fear of retribution.

c. Other SOX Issues: What Constitutes "Protected Activity?"

i. Gale v. World Financial Group, ARB No. 06-083, ALJ No. 2006-SOX-43 (ARB May 29, 2008). The ARB found no protected activity where the complainant only expressed "concerns" about the business operations of the parent company, but then later indicated during his deposition that he did not believe his employer engaged in any fraudulent or illegal activity.

ii. Andaya v. Atlas Air, Inc. No. 10-cv-7878 (S.D. N.Y. Apr. 30, 2012). The United States District Court for the Southern District of New York found no protected activity when the complaints largely related to internal corporate policies concerning corporate waste, personnel matters, and vendor relationships. Such subjects, the court found, are not typically covered by SOX.

iii. Robinson v. Morgan Stanley, AR Case No. 07-070 (Jan. 10, 2010). The ARB found that performing one's assigned job duties, which include reporting, may constitute protected activity. Sox's anti-retaliation provision "does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties."

iv. But cf. Riddle v. First Tennesee Bank, No. 3:10-cv-0578 (M.D. Tenn. Sept. 16, 2011), in which the court found the complainant had not engaged in protected activity because she was only performing her ordinary job responsibilities and she did not step outside her role when reporting the alleged violations.

v. Stewart v. Doral Financial Corp., 13-cv-1349 (D. P.R. Feb. 21, 2014). The United States District Court for the District of Puerto Rico found protected activity when the principal accounting officer merely raised "concerns" to the employer's audit committee that the company would, in the upcoming quarters, fail to accurately report financial information.

IX. Relationship Between Counterclaims and Retaliation Claims in Employment Litigation

a. Beware the pitfalls of filing counterclaims in response to a suit by a former employee, as several employers have been subject to retaliation claims for the practice.

b. In Werman v. Excel Dentistry, P.C., No. 13 Civ. 7028 (S.D. N.Y. Jan. 25, 2014), the Southern District of New York concluded that filing frivolous counterclaims could violate the New York State Human Rights Law. The plaintiff, formerly a dentist for the defendants, sued for sexual harassment and sex discrimination after her termination. In their answer, the defendants alleged that the plaintiff secured her employment through fraud, submitted fraudulent insurance claims, converted her employer's funds, and inflicted emotional distress on her supervisor. The court found that although the merits of the counterclaims had factual issues that could not be resolved on a motion to dismiss, the plaintiff had plausibly alleged in her amended complaint that the defendants filed frivolous counterclaims in retaliation for filing the lawsuit.

c. In MacDermid, Inc. v. Leonetti, 310 Conn. 616 (Conn. 2013), the Connecticut Supreme Court ruled that the doctrine of absolute immunity did not bar a former employee from filing a counterclaim against his former employer alleging that the lawsuit against him was filed in retaliation for the employee's worker's compensation claim. The employee was sued for theft, fraud, unjust enrichment, and conversion, based on the employee's admission that he never intended to release his worker's compensation claim. The employee responded with a counterclaim alleging that the suit was in retaliation for his decision to exercise his rights under the Connecticut Worker's Compensation Act. The Connecticut Supreme Court held that employee's counterclaim was comparable to an abuse of process claim, so the employer did not enjoy absolute immunity from suit in such instances.

d. Some courts have even held that threatening to bring a lawsuit against an employee constitutes unlawful retaliation. In 2010, the United States District Court for the District of Colorado held that a letter to an employee demanding that the employee cease and desist from misappropriating trade secrets could form the basis of a discrimination retaliation claim. Hertz v. Luzenac, No. 04-cv-01961 (D. Colo. Nov. 29, 2010).