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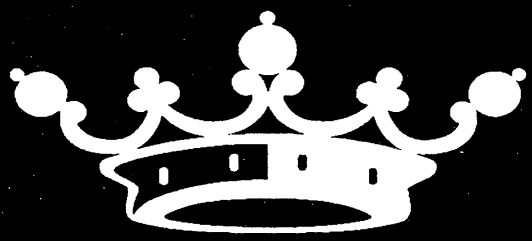

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Recent US Supreme Court Cases Suggest an Increasing Willingness to Expand the Scope and Availability of Retaliation Claims

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Introduction

Statistics show that retaliation claims by employees are on the rise. "EEOC Charge Statistics FY 1997-FY 2010," *available at* www.eeoc.gov. Numerous federal and state statutory schemes, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act (FMLA), contain potent anti-retaliation provisions.

A slew of recent United States Supreme Court decisions reveal an increasing willingness by the High Court to expand or extend the ability of employee-claimants to pursue claims of retaliation. This trend alone is disturbing. However, when coupled with the Supreme Court's recent adoption of the "Cat's Paw" theory of discrimination, it means employers must become more careful in their efforts to prevent an employee's protected activity from ripening into an actionable claim for retaliatory discrimination. *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (U.S. 2011). This chapter discusses this trend, and encourages employers to take action, by more carefully educating a *broader* cross-section of management to remain vigilant regarding situations that can be painted in hindsight as fueled by a retaliatory motive.

Retaliation Liability in 2011: A Snapshot

Regardless of statutory basis, retaliation claims typically require an employee-claimant to show (1) she engaged in a protected activity, (2) she suffered a materially adverse employment action, and (3) a causal nexus between the protected activity and the adverse employment action. The employee's protected activity frequently involves a complaint to the employer, an agency, or a court, of discrimination. Two opinions issued earlier this year illustrate the Supreme Court's willingness to expand the reach of liability under this theory.

Kasten v. Saint-Gobain

In March 2011, the Supreme Court issued *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (U.S. 2011). Saint-Gobain manufactures

performance plastics. Time-clocks were situated such that some employees were unpaid for time they spent donning and removing work-related protective gear. Among these was Kevin Kasten, who complained about the time-clock internally to a shift supervisor, a lead operator and a human resources manager, suggesting that Saint-Gobain would "lose" in court if someone challenged the location of the time-clocks. Saint-Gobain fired Kasten after his own repeated failure to record his attendance on the time-clock.

Kasten sued Saint-Gobain, alleging his termination was in retaliation for complaining about the illegal location of the time-clock. Specifically, he claimed Saint-Gobain had violated a provision of the FLSA which makes it actionable "to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to" the FLSA. 29 U.S.C. § 215(a)(3). The District Court and the Seventh Circuit held the FLSA anti-retaliation provision did not cover *oral* complaints.

The Supreme Court, noting a conflict among the Circuits, granted certiorari to consider whether Kasten's oral complaint qualified for protection under the Act. Importantly, although the District and Seventh Circuit courts had both addressed the question whether Kasten's *internal* complaint only to his employer—as opposed to a judicial or regulatory body—met the FLSA standard, the Supreme Court refused to consider this argument because Saint-Gobain failed to raise it in its certiorari brief.

Noting that the language of the statute alone was inconclusive, the Supreme Court focused instead on "functional considerations" which, it concluded, indicate Congress intended the anti-retaliation provision to cover oral as well as written complaints. Limiting the protection to written complaints, said the Court, would undermine the FLSA's basic objective, which was to enable agencies to rely on information and complaints received directly from employees—rather than regulators or investigators—about prohibited labor conditions. Particularly at the time the statute was enacted, these employees included those who "would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers." *Karsten*, 131 S. Ct. at 1333. Additionally, the Court reasoned, limiting protected complaints to only those in writing "could prevent

Government agencies from using hotlines, interviews, and other oral methods of receiving complaints," again frustrating the Act's objectives. *Id.* at 1334.

The Supreme Court has thus arguably precluded an employer from arguing that an employee was not engaged in a "protected activity" because she did not reduce a complaint to writing, and has thereby expanded the scope of such liability.

Thompson v. North American Stainless, LP

Kasten follows another opinion issued this year that expanded the scope of protection accorded workers against retaliation, *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (U.S. 2011). Eric Thompson's fiancé filed a sex discrimination charge against their mutual employer, North American Stainless. When Thompson was subsequently fired, he sued, claiming retaliation under Title VII of the Civil Rights Act, which provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because *he has made a charge*" under Title VII. 42 U.S.C. § 2000e-3(a). The statute permits a civil action to "be brought ... by the person claiming to be aggrieved ... by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b), (f)(1). Relying on this language, the District Court granted summary judgment for the employer. The Sixth Circuit ultimately affirmed, reasoning "because Thompson did not 'engag[e] in any statutorily protected activity ... he is not included in the class of persons for whom Congress created a retaliation cause of action.'" *Karsten*, 131 S. Ct. at 867.

The Supreme Court granted certiorari and reversed. Dispensing first with the question whether Thompson's termination constituted unlawful retaliation, the Court noted that Title VII's anti-retaliation provision "must be construed to cover a broad range of conduct," and is intended to prohibit "any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 868. The Court found no difficulty concluding it is "obvious that a reasonable worker might be dissuaded from ... [making a discrimination complaint] if she knew that her fiancé would be fired." *Id.*

Addressing "the more difficult question," whether Title VII grants Thompson a cause of action, the Court was compelled to conclude that, although Thompson had not been the employee engaged in the protected activity (the test urged by North American Stainless), he was still "a person claiming to be aggrieved" and entitled to Title VII protection. Here, the Court adopted the following broad standard:

> We hold that the term 'aggrieved' in Title VII incorporates this test, enabling suit by any plaintiff with an interest 'arguably [sought] to be protected by the statutes.

Id. at 870. Thompson easily met this test. He was an employee of North American Stainless. The purpose of Title VII is to protect employees from their employers' unlawful actions. And he was not an accidental victim of the retaliation, since hurting him was arguably the employer's intended means of harming his fiancé, who initiated the discrimination complaint.

Here, again, the Supreme Court has broadened the scope of liability for a claimed act of retaliation. The argument is no longer available that a plaintiff cannot recover for retaliation just because he or she was not the employee engaged in the statutorily protected activity.

Burlington Northern *and its Progeny*

Kasten and *Thompson* can be viewed as extending a trend toward expansion of protection against retaliation going back at least as far as the Supreme Court's 2006 opinion in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006). Sheila White was the only female working in the Maintenance of Way department at Burlington's Tennessee Yard. She complained to Burlington that her immediate supervisor insulted her in front of male colleagues and told her that women should not be working in the department. The supervisor was disciplined. White was later reassigned from forklift duty, ostensibly to address co-workers' complaints that a "'more senior man should have the less arduous and cleaner job' of forklift operator." *Id.* at 2409.

White sued under Title VII for sex discrimination and retaliation. The jury found in her favor and the Sixth Circuit affirmed. The Supreme Court

granted Burlington's petition for certiorari to settle conflicts among the Circuits on: (1) whether retaliation, to be actionable, must have affected the terms and conditions of employment, and (2) how harmful the adverse actions must be to fall within the protection afforded by Title VII. Both Burlington and the government urged the Court to require a "link" between the challenged retaliatory action and "the terms, conditions, or status of employment." *Id.* at 2411. The Court refused to adopt this restrictive standard, holding instead that Title VII is not limited to actions affecting employment or altering the conditions of the workplace.

Additionally, the Court clarified the level of seriousness to which the retaliatory harm must rise in order to be actionable. It made two important pronouncements in this regard. First, it held that a plaintiff seeking to recover for retaliation must show "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or opposing a charge of discrimination.'" *Id.* at 2415. Second, it affirmatively stated that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.*

This later point is important. The "impact" of a particular arguably retaliatory act will "depend on a constellation of surrounding circumstances, expectations, and relationships." *Id.* By way of illustration, the Court observed that a simple schedule change might make no difference for many workers, but could matter enormously to a young mother with school-age children.

In taking a more expansive view of the scope of protection from retaliation than what had previously been afforded under standards adopted by the Fifth, Sixth and Eighth Circuits, *Burlington* can be seen as something of a turning point. *CBOCS West Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008), decided in 2008, extended this trend. Hedrick Humphries, an African-American, filed claims under Title VII and an older "equal contract rights" provision, 42 U.S.C. § 1981, for racial discrimination and retaliation after he complained to managers that a fellow assistant manager had dismissed another African-American employee for race-based reasons. Humphries failed to pay necessary filing fees, resulting in dismissal of his Title VII action. The District Court then granted summary judgment on the

remaining § 1981 claims on the basis that § 1981 does not encompass retaliation claims. The Sixth Circuit Court of Appeals ultimately affirmed summary judgment.

Granting certiorari, the Supreme Court took the opportunity to find that, despite the lack of any statutory language conferring a right to sue for retaliation, § 1981 indeed encompasses a claim for retaliation. In reaching this result, the Court reasoned: (1) § 1981 has always been treated and interpreted consistently with 42 U.S.C. § 1982; and (2) the Court had previously held that § 1982 encompasses claims for retaliation. Justice Thomas, writing for the dissent and echoing the sentiment of the defense bar, criticized the majority for "crafting its own additional enforcement mechanism ... out of whole cloth to effectuate its vision of congressional purpose." *CBOCS*, 128 S. Ct. at 1970, Thomas, J., *dissenting.*

While less startling, *Crawford v. Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 129 S. Ct. 846 (2009), is another example. There, a county government conducted an investigation into rumors of sexual harassment by a school district employee relations director. During internal interviews, Vicky Crawford described several instances of "inappropriate behavior" by the director. Following the investigation, no action was taken against the accused harasser, but Crawford and certain others cooperating in the investigation were fired. Specifically concerning Crawford, the county claimed she was guilty of embezzlement.

Crawford sued the county under Title VII, alleging she was fired in retaliation for her report of the director's behavior. The District Court granted summary judgment for the employer, and the Sixth Circuit affirmed, on the basis that Crawford had not "instigated or initiated any complaint," but merely answered questions. Perceiving that the Sixth Circuit's decision conflicted with other Circuits, the Supreme Court granted certiorari and reversed.

The Court framed the question as whether Crawford's statements during the investigation met the statutory requirement, which makes it "unlawful ... for an employer to discriminate against any ... employe[e] ... because he has opposed any practice made ... unlawful ... by this subchapter." 42 U.S.C. § 2000e-3(a). The Court noted that the term "oppose" is left undefined by the

statute, and thus carries its ordinary meaning. This meaning, it found, goes beyond active, consistent, or provocative behavior, to include merely affirmatively responding to questions about another's offensive behavior. In finding Crawford had met the standard, the Court noted:

> If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.

Crawford, 129 S. Ct. at 852. To the perceptive, these cases illustrate a trend by the Supreme Court toward expanding, where possible, the scope of employers' potential liability for retaliation. The Court has repeatedly seized opportunities to "open the door" to plaintiffs who might previously have been left without a remedy.

Staub v. Proctor Hospital and the "Cat's Paw" Theory

Taken alone, this trend of expansion of retaliation liability should put employers on edge, particularly in view of the growing incidence of such claims. However, the trend takes on even greater importance when considered in light of the Supreme Court's recognition of the "cat's paw" theory of discrimination liability in another 2011 opinion, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (U.S. 2011).

To understand the "cat's paw" theory, particularly in the context of a retaliation suit, we revisit the plaintiff's prima facie burden of proof. It is often simple for a plaintiff to meet her burden of showing (1) she engaged in a protected activity (i.e., complaining of discrimination), and that (2) she suffered a materially adverse employment action (i.e., termination). The difficulty arises in proving (3) a causal nexus between the protected activity and the adverse employment action. Many jurisdictions required plaintiffs to show the retaliatory *animus* was present in the ultimate decision-maker—the supervisor responsible for effectuating the materially adverse employment action. The plaintiff's case would fail unless she had evidence the person who signed her pink slip did so to punish her for a complaint.

Under a "cat's paw" theory, however, where the person responsible for the adverse action was simply acting as the "cat's paw" of others who possessed retaliatory motives, the plaintiff can meet her burden of proving a causal nexus between her engagement in a protected activity and the adverse employment action. *See, Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002). This can appreciably ease a plaintiff's proof problems in a retaliation case.

In the *Staub* case, Vincent Staub, an angiography technician for Proctor Hospital, was a member of the US Army Reserve. This required him to commit time to attend drills and training, taking him away from his job. Certain of Staub's immediate supervisors were hostile to Staub's military obligations. One of the supervisors, for example, scheduled Staub for additional shifts without notice, "so that he would 'pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.'" 131 S. Ct. at 1189. The same supervisor issued Staub a disciplinary warning for failing to stay in his work area when not working with a patient. Later, when another supervisor informed the hospital's vice president of human resources that Staub had again left his work area, in violation of the warning, the vice president reviewed Staub's personnel file and decided to terminate him because he "had ignored the directive" issued following the disciplinary warning. Id.

Staub unsuccessfully challenged the firing under the hospital's internal grievance process. He then sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994, claiming his discharge was "motivated by hostility toward his military obligations." Id. at 1190. Although a jury returned a verdict in Staub's favor, the Seventh Circuit Court of Appeals reversed, holding that Seventh Circuit precedent prohibited recovery under a "cat's paw" theory "unless the nondecisionmaker exercised such 'singular influence' over the decisionmaker that the decision to terminate was the product of 'blind reliance.'" Id.

The Supreme Court granted certiorari and reversed. Analyzing the situation under principles of traditional tort law and agency, the Court made several observations that caused it to expand liability under the "cat's paw" doctrine beyond the limitation previously adopted by the Seventh Circuit. The Court noted, for example, that the immediate supervisor could be

considered an *agent* of the employer, thus imputing this supervisor's unlawful, discriminatory *animus* to the employer. Further, the Court observed that "[a]n employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors." Id. at 1192-93. If, as alleged in the case of Staub's termination, the ultimate decision-maker takes an immediate supervisor's biased report into account, without independently determining that the adverse employment action was—apart from the biased supervisor's report—entirely justified, the employer may be liable under this application of the "cat's paw" theory.

Where to Go From Here

What should employers glean from this trend of expansion of liability for retaliation claims, particularly in light of the Court's adoption this year of the "cat's paw" theory? Certainly development and refinement of policies designed to eliminate or reduce situations which can be painted—sometimes creatively—into adverse employment actions motivated by retaliatory desires remain crucial to avoiding liability. These must include education regarding how to recognize and deal appropriately with an employee's formal or informal complaint or report. These must also include prompt and thorough investigations whenever a complaint or report is made. As always, the complaint, the investigation (including statements, interviews and conversations) and any subsequent events (decisions to discipline or otherwise) should be carefully documented. *Careful*, appropriate documentation of an investigation, rather than loose, off-the-cuff or innuendo-laden remarks, are important, since the later often becomes the most important evidence against the employer in retaliation cases.

But these steps are really nothing new. What is arguably new, given the expansion of liability under a "cat's paw" theory, is the scope of personnel who must be carefully educated in how to avoid liability for retaliation. Training must not be limited to human resources professionals or top-level management, but should be provided to any supervisor or managing agent who has the ability to influence an adverse employment action. Conservatively, some might argue this should extend all the way to co-

workers with no supervisory authority whatsoever. After all, the *Staub* Court noted that non-supervisory co-workers had also complained about Staub, which complaint became part of his personnel file, which was reviewed by the human resources vice president in making the decision to fire him. An adverse employment action made based on a co-worker's biased complaint, without an independent determination that the adverse action was entirely justified, could expose an employer to liability for retaliation.

Conclusion

While claims of retaliation are becoming more frequent, employer defenses to such claims appear to be dwindling. Since at least 2006, the Supreme Court has consistently expanded liability for alleged retaliation. Statutes affording remedies for conduct alleged to be retaliatory are increasingly being construed quite broadly, sometimes exposing employers to new and novel claims. On top of this, the Court's adoption this year of the "Cat's Paw" theory means the conduct of a broader cross-section of management must remain wary and guard against conduct that, in hindsight, can be construed as retaliatory.

But the news isn't all bad. There are strategies available to employers to reduce their exposure under this increasingly popular liability theory. Thoughtfully crafted and carefully followed policies are the first step. Education of a deeper cross-section of management on how to recognize and avoid retaliation is another. Careful, unbiased, well-documented investigations of complaints is yet another. Until the expanding trend of liability reverses, if it does, employers must be increasingly vigilant to avoid become the target of a lawsuit for retaliation. Taken together, these practices will carry employers a long way toward reducing their exposure.

Key Takeaways

- Make a priority the development and refinement of policies designed to eliminate or reduce situations that can be interpreted as retaliatory actions.
- Educate employers/management in how to recognize and deal appropriately with an employee's formal or informal complaint or report.

- Focus on documenting the investigation to avoid loose talk and innuendo that could become evidence against the employer in retaliation cases.
- Because of the "Cat's Paw" theory, do not limit education on avoiding retaliation to human resources professionals or top-level management, but include anyone with the ability to influence an adverse employment action.
- In consideration of the *Staub* case, training should be considered even for co-workers with no supervisory authority whatsoever. Employment decisions based on a co-worker's biased complaint, without an independent determination, could expose an employer to liability for retaliation.

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