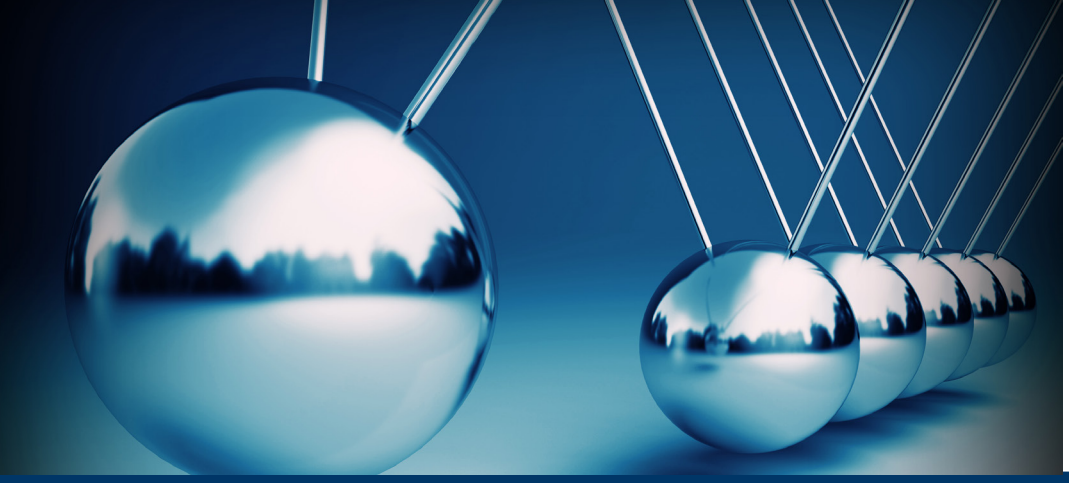

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RETALIATION CLAIMS ARE DIFFICULT TO DEFEND: REDUX

By Barry J. Waters

A few weeks ago, we reported on a retaliation judgment in U.S. District Court, Connecticut, Summerlin v. Almost Family, Inc. ("Retaliation Claims Difficult to Defend"). The retaliation case discussed below did not cost the employer anywhere near the more than $500,000 judgment entered against Almost Family, but the result on a strange set of facts may be harder to accept from an employer's point of view. In any event, the case does fairly illustrate the concepts of "adverse employment action" and "protected activity."

Company President Named

On December 30, 2015, a Massachusetts Commission Against Discrimination (MCAD) Hearing Officer determined that the employer and its President had violated both Title VII and Massachusetts law in terminating Tiffany Schillace, in retaliation for her then fiancé's prior complaint of sexual harassment and retaliation. MCAD v. Enos Home Oxygen Therapy, Inc. ("HOT") and Jon Enos ("Enos"), as President, 2015 Mass. Comm. Discrim. LEXIS 35 (2015). HOT is a family medical supply business in New Bedford. The company hired Schillace as a customer service representative on April 2, 2012. Her then fiancé, Michael St. Martin, already worked at HOT as a driver. They had been living together for six years, he was the father of her two children, and he had recommended Schillace for employment. The basis for St. Martin's retaliation complaint, which he filed on June 12, 2012 (71 days into Schillace's 90-day probationary period), was his participation as a witness in the MCAD complaint "of a friend and co-worker," one Daniel Russo.

Complainant's Fiancé Engaged in Larceny

Months after Schillace's termination, HOT discovered an additional twist to the retaliation-on-retaliation claims: Russo and St. Martin had established a criminal conspiracy to steal equipment from the company and re-sell it on the internet – on a website St. Martin created in Schillace's name. Schillace disavowed any knowledge of this activity and she was not charged with a crime. Russo and St. Martin pled guilty. (By the end of 2012, St. Martin and Schillace were no longer living together and presumably no longer engaged).

Discrimination Claim Begets Retaliation Claim Begets Second Retaliation Claim

HOT learned of St. Martin's MCAD Charge on June 15, 2012. Schillace alleged that the retaliation campaign began that very day - with Enos staring at her for 10-15 minutes in a manner that she described as intimidating - and resulted in a written warning on June 19. She submitted a lengthy written rebuttal to the warning the very next day. Schillace was twenty-two years old at the time, had a high school education, and had attended cosmetology school for two plus years. She had no prior experience as a customer service representative. She claimed at the MCAD hearing that she had written the rebuttal herself. However, based on the language used

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in the rebuttal, including legal terms, the Hearing Officer concluded that her lawyer had written the rebuttal. Recognizing immediately that the rebuttal must have been written by a lawyer, Enos consulted with the company lawyer. On June 30, Schillace received a disciplinary notice for loud and disruptive swearing and laughing in the customer service area, including use of the "f" word. On July 2, 2012, Schillace filed her retaliation Charge and on July 3 she was given her 90-day performance review and was discharged. At the MCAD hearing three years later, there was contradictory testimony from the Company's own management employees about who had made the disciplinary and termination decisions. The Hearing Officer concluded that Enos himself had made the disciplinary decisions – and had decided on the termination after obtaining legal advice.

"Close Family Member" Protected

The United States Supreme Court has determined that an individual may bring a Title VII retaliation claim "if she has an interest arguably sought to be protected by the statute, even if the individual did not engage in protected activity." Here, Schillace did not engage in protected activity until the day before she was let go, at the end of her 90-day probationary period. However, she claimed that she had been retaliated against from the day the Company learned of her fiancé's MCAD complaint. In a 2011 case, the Supreme Court determined that an employer violated the anti-retaliation provisions of Title VII by firing the fiancée of an employee who complained of discrimination. This followed a 2006 Supreme Court decision in which the Court determined that "a close family member" who is the subject of an adverse action will almost always be protected against retaliation for protected activity engaged in by the family member. Two points are worth underscoring:

1. The courts interpret the retaliation provisions of Title VII expansively to include individuals who have an interest "arguably sought to be protected by the statute," even if that individual did not engage in protected activity.

2. The anti-retaliation provisions have been interpreted to include a broad range of employer conduct (not just formal discipline or discharge); that conduct includes actions that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."

As the Hearing Officer pointed out: "The Massachusetts Supreme Judicial Court has likewise adopted an expansive view of protections of c.151B in the context of 'associational discrimination.'" Associational discrimination under state law refers to "a claim that a plaintiff, although not a member of the protected class himself or herself, is the victim of discriminatory animus directed toward a third person who is a member of the protected class and with whom the plaintiff associates."

Criminal Activity Irrelevant

By the time of the Public Hearing at the MCAD, which lasted five days, three years had passed since Schillace had been terminated, and St. Martin and Russo had pled guilty to stealing HOT equipment and re-selling it – from the home shared by St. Martin and Schillace, no less. What might be characterized as a gross understatement, the Hearing Officer acknowledged that "Enos was understandably furious at Schillace, St. Martin and Russo" under the circumstances. Unfortunately for HOT, because it did not discover the criminal enterprise until after all three had left the Company, that evidence was not relevant to the retaliation claim.

Company President Not Believed

The Hearing Officer found that there "was ample evidence from supervisors and colleagues that Complainant's attitude, behavior and performance were lacking in some respects as reflected in the 90-day evaluation" presented to her by her supervisors. However, the Hearing Officer also rejected the Company's position "that it was merely a coincidence that her 90-day review followed close on the heels of St. Martin's complaint." Damaging to the Company's and Enos' defense was the testimony of Schillace's direct supervisor that her manager, and her manager's manager, had "convinced" her that termination was appropriate. The supervisor also testified that she would not have recommended termination, but that the discussions with her two managers "caused her to change her mind." Enos denied any involvement in the decisions to discipline or terminate Schillace. The Hearing Officer simply did not believe him. The Hearing Officer concluded that Enos: (1) was angry with St. Martin for filing his retaliation complaint, (2) had stared at Complainant in an intimidating fashion because he was so angry at St. Martin, and (3) had driven the decision to terminate Schillace because of her relationship to St. Martin.

Employee's "Lost Pay" More than Double Her Actual Earnings

Schillace had worked 20-25 hours per week (for less than 90 days) earning $10.00 per hour, which means that her total earnings as a HOT employee were in the $3,000 range. She remained unemployed for ten months after the termination. The Hearing Officer found that her lost pay damages were $8,000.

Welfare as Mitigation

Schillace received welfare benefits of $500/month and food stamps but did not receive unemployment benefits. (The unstated implication is that she was denied unemployment compensation benefits. It is a rare case, indeed, where the Complainant is denied unemployment compensation benefits but prevails on her Title VII claim.) The Hearing Officer reduced the lost pay claim to $4,000 because of the public assistance benefits she had received during her period of employment.

Emotional Distress Damages Awarded in Spite of the Facts

Schillace testified that she "suffered great emotional distress after her termination, could not eat or sleep, was anxious and frightened, did not want to get out of bed and could not care for her two small children." She claimed that the stress of her termination was a primary factor in her break-up with St. Martin. She also testified that she had sought psychiatric treatment on several occasions prior to her employment at HOT. She testified that St. Martin's arrest and trial and her break-up with him did not significantly contribute to her emotional distress. The Hearing Officer did not believe her, stating: "In October of 2012, New Bedford law enforcement officers raided her and St. Martin's with search warrants looking for St. Martin, threatened to arrest her if she did not cooperate, and seized their computer and cameras. St. Martin was arrested and taken away in handcuffs on that occasion. He was later charged and pled guilty to embezzling medical equipment and computer crimes."

And yet: the Hearing Officer awarded $5,000 in emotional distress damages resulting from her termination! (She must have really disliked the Company President.)

Damages Award Triple Actual Earnings

This is a relatively small case in the litigation world. But it illustrates how damages can mount up. Here, the lost pay plus emotional distress award was triple this probationary employee's actual earnings, *before* interest and attorney's fees were accounted for.

Beware of Interest Awards

The Hearing Officer awarded interest from the date of the complaint (three and one-half years earlier) at TWELVE PERCENT, as provided under Massachusetts law, on the total award of $9,000, accruing until the judgment is paid.

… and Attorney's Fees

were also awarded, though not included in the reported decision. The attorney's fees award, undoubtedly, will be many multiples of the damages award.

Take Aways

Tell the truth. As a disciplinary and termination process evolves, be aware that how, when and by whom the decision to discipline/terminate was arrived at is part of the story that will be told at trial. Too many times, we have cases in which it is difficult for us, even as defense lawyers, to determine how and by whom the termination decision was made.

Be aware that an employee who supports another employee's complaint of discrimination or retaliation cannot be discriminated or retaliated against. An employee with a close personal relationship to the employee engaging in protected activity may have a basis for a retaliation claim, even if she does not engage in protected activity herself.

Understand that an "adverse employment action" broadly includes any conduct that might discourage an employee from making or supporting a Charge of discrimination.

Make sure all discipline is supported by legitimate, nondiscriminatory reasons, and that the otherwise supportable action is not tainted by a discriminatory motive.

Be aware that the 20-20 hindsight review of your disciplinary actions by the EEOC, MCAD, CHRO, or state or federal court, may not take place for several years afterward.

Do a thorough vetting of applicants before you hire. Consider offering a modest severance payment, even for a probationary employee, in exchange for a release when you let employees go.

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