"WHY I OUGHTA . . ." RESIST RETALIATION OR RISK BEING A STOOGE

Andrew S. Golub
Dow Golub Remels & Beverly, LLP
9 Greenway Plaza, Suite 500
Houston, Texas 77046
asgolub@dowgolub.com

Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
mark@osattorneys.com

Regional Liquor Distributor Learns of EEOC Charge

Employee Protected Even Where Employer Acts Upon Mistaken Belief That Plaintiff Engaged in Protected Conduct

- *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016).
- Lawrence Spagnola, a good friend of Police Officer Heffernan, was running for mayor of Paterson, N.J. Heffernan was not involved in the campaign.
- Heffernan's supervisor and the Chief of Police were both appointees of the incumbent mayor, Spagnola's opponent.
- As a favor for his bedridden mother, Heffernan went to get her a yard sign.

Heffernan, cont'd

- Oops.
- Heffernan was spotted, the rumor mill went nuts, and the next day Heffernan was demoted from detective to patrol officer for what his supervisors thought was his "overt involvement" in Spagnola's campaign.
- The district court found no viable claim because Heffernan had not actually engaged in any protected First Amendment conduct.
- The Third Circuit affirmed and the Supreme Court reversed.

More *Heffernan*

- "[T]he government's reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in [protected] political activity . . ., the employee is entitled to challenge that unlawful action . . . even if, as here, the employer makes a factual mistake about the employee's behavior."
- The Court in particular focused on the implications of letting such conduct go unprotected.
- After all, "[t]he discharge of one tells the others that they engage in protected activity at their peril."

Reasonable Belief Standard Applies To Witnesses Claiming Retaliation Under Title VII

- *E.E.O.C. v Rite Way Svc., Inc.*, 819 F.3d 235 (5th Cir. 2016).

- The Fifth Circuit held that the well known "reasonable belief" standard applied to retaliation claims brought by third-party witnesses.

- In other words, merely being a witness who supported the complainant in an internal company sexual harassment investigation was not enough to constitute protected conduct. Rather, to be protected under Title VII, the witness must have reasonably believed that the situation they were providing information about constituted a violation of Title VII.

Reasonable Belief, cont'd

- The Court rejected the EEOC's argument for essentially automatic protection, stating that "creating a lower threshold for reactive plaintiffs bringing retaliation claims would be at odds with *Crawford's* reasoning that the language of the opposition clause does not permit courts to treat reactive opposition any differently than proactive opposition."

- Nevertheless, on fairly thin evidence, the Court held the employee-witness had a reasonable belief that sexual harassment was occurring, and thus reversed a summary judgment that had been granted in the employer's favor.

But, Reasonable Belief May Still Be Based on a Single Comment

- *Cuellar v. Southwest General Emergency Physicians, P.L.L.C.*, ___ Fed. App'x ___, 2016 WL 4150911 (5th Cir., Aug. 4, 2016)
- 12(b)(6) dismissal reversed, even though sex harassment complaint was based on a single comment.
- Citing *Rite Way,* the Court reiterates that i) a viable retaliation claim does not require a viable discrimination claim and ii) opposition clause claims grounded in isolated comments are not always doomed to dismissal.

Can Forced Arbitration Agreement Be Retaliatory?

- Maybe. *Kubala v. Supreme Production Services, Inc.*, __ F.3d ___, 2016 WL 3923866 (5th Cir., July 20, 2016) (Higginbotham, J., concurring)
- The case is about enforceability of an arbitration agreement, first presented to Kubala after his overtime suit was filed but before, according to the employer, it learned about it.
- The Court found the agreement enforceable and remanded for referral to arbitration.
- In a brief concurrence, Judge Higginbotham ruminated about the "troubling implications" of Supreme's argument:

Forced Arbitration, cont'd

- "But what if a Texas employer with no extant arbitration agreement, once notified of an employee's FLSA suit, threatens to fire the employee unless he agrees to arbitrate the suit? Its threat would coerce the plaintiff into relinquishing his FLSA-given right to decision by an independent judiciary for private decision by appointed private arbitrators, just as powerfully as if the employer had demanded he drop the suit outright. With all deference to the judiciary's recent and warm embrace of arbitration, who decides and whether it is a public or private proceeding matters a great deal, arriving on stage as it does redolent with large concerns attending a regime of contracting out justice – when consent so often must be blind to inequality of bargaining power."

Forced Arbitration, cont'd

- Judge Higginbotham further questioned the threshold validity of any arbitration agreement "exacted" under such circumstances.

Admission That Protected Conduct Was One of the Cumulative Factors Causing Termination Insufficient to Warrant Jury Trial

- *Heggemeier v. Caldwell County, Texas*, ___ F.3d ___, 2016 WL 3457260 (5th Cir., June 23, 2016)
- ADEA retaliation case
- County Judge testified that all of Heggemeier's actions, including his protected complaint, were "cumulative" factors influencing the vote to terminate him.
- "The district court correctly noted that these comments are unsubstantiated, conclusory, and speculative."
- Summary judgment affirmed

Assignment to Janitorial Duties Not Necessarily Materially Adverse

- *Wheat v. Florida Parish Juvenile Justice Comm.*, 811 F.3d 702 (5th Cir. 2016)
  - Because plaintiff offered no context evidence or explanation, the Court decides (2-1) that assigning director level employee to perform janitorial duties did not inherently raise fact question about the material adversity of that action.
  - Underscores that plaintiffs **must** present affirmative evidence of why and how the action against them was materially adverse.

Wheat, cont'd

- Very strange case.
  - As to assignment to janitorial duties, summary judgment affirmed for failure to establish second prong of the prima facie case. But, in the trial court the employer conceded that plaintiff had established a prima facie, and the issue does not seem to have been briefed on appeal.
  - Dissent by District Judge Carlton Reeves, sitting by designation -- extremely well-written, common sense-based opinion.
  - Summary judgment reversed, though, because Wheat was terminated and the Court found evidence of pretext as to her termination claim.

Adverse Action – Context Matters. Also, The Evidence Matters.

- *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014)
- Davis complained that:
  - She was subjected to daily thirty-minute meetings with upper management;
  - Management superseded her authority by giving orders and assigning tasks directly to her subordinates;
  - Her computer server administrative rights were terminated;
  - Her staff was reduced from 15 to 4; and
  - She was terminated.

Davis v. Fort Bend County, continued

- Davis presented no evidence of context sufficient to establish the circumstances that made these particular actions (except for termination) materially adverse.
- She did not even offer any evidence that she viewed the actions as a demotion, that they embarrassed her, made her duties more arduous, or carried any stigma in the workplace.
- Practice pointer – Context and supporting evidence are key to establishing retaliatory adverse action.

Employer's Refusal to Allow Resignation Rescission May Be Actionable Adverse Action

- *Porter v. Houma Terrebonne Housing Authority Bd. of Commissioners*, 810 F.3d 940 (5th Cir. 2015)

- Refusal to permit rescission may be actionable adverse action for two reasons.
  - The context in which refusal was made, per *Burlington Northern*
  - Refusal is not per se retaliatory, but may be if done "*because* the employee has engaged in a protect activity is nonetheless an adverse employment action." (italics in original)

Threat to Reduce Employee's Pay is Not Necessarily Adverse Action

- *Brandon v. Sage Corp.*, 808 F.3d 266 (5th Cir. 2015).
  - Brandon refused Campanian's order to fire truck drive Lorette Eure, "whose 'gender expression was traditionally masculine.'"
  - Campanian stated that Sage did not hire "cross-gender" people and that Brandon would be disciplined for having hired Eure.
  - Campanian told Brandon "we'll deal with you seriously" for hiring Eure and, after purportedly conferring with Sage's president, told Brandon her pay was to be cut 50%.

Brandon, cont'd

- Brandon submitted her resignation.
  - But, when Sage's president returned from traveling, he apologized and said Campanian had no authority to cut Brandon's pay.

- Court holds that because Brandon reported directly to the President, not Campanian, no reasonable jury could possibly find Campanian's threatening conduct to dissuade protected conduct.

Brandon, cont'd

- Campanian was a Sage founding partner, company Vice President, and stockholder.
- Court nonetheless finds (with little explanation) that Campanian was not so highly placed that her conduct would automatically be imputed to the company.
- Finally, the Court finds no liability under agency principles on grounds that Campanian had no express authority over Brandon's employment.

Post-*Nassar*, Does Cat's Paw Still Apply in Retaliation Cases?

- This was an open question until last summer. Zamora v. City Of Houston, 798 F.3d 326 (5th Cir. 2015), *cert. denied*, No. 15-868 (May 16, 2016)
  - "Read together, *Nassar* and *Staub* . . . make clear that cat's paw analysis remains viable in the but-for causation analysis."
  - "In short, *Staub* supports using a cat's paw theory of causation in but-for cases, and nothing in *Nassar* is to the contrary."

Cat's Paw, continued

- With *Zamora,* Fifth Circuit joins all other circuits that have addressed the question.
- *Zamora* says same rationale might apply to ADEA and other but-for statutes, but issue is not presented in *Zamora*.
- No reason to think a different result would apply.

Double Cats Paw Recognized as Viable, Pre-*Zamora*

- *Jackson v. Frisco Ind. Sch. Dist.*, 798 F.3d 589 (5th Cir. 2015)
  - African-American teacher/coach's contract was not renewed by public school, and he sued.
  - Fifth Circuit reversed summary judgment granted for employer in a Title VII/TCHRA discrimination and retaliation case.

Double Cats Paw Recognized as Viable, Pre-*Zamora*, continued

Retaliatory motive by Principal and Assistant Principal could be imputed to the school district because:

1. The school district board relied on a hearing examiner's recommendation not to renew the Plaintiff's contract;

2. The hearing examiner relied on the testimony of the Principal and Assistant Principal, and their evaluations of the Plaintiff, to reach the recommendation not to renew the Plaintiff's contract.

The evidence that the Principal and Assistant Principal were motivated by retaliation in their decision not to renew the Plaintiff's contract, was primarily proof that: (a) other similarly situated teachers' contracts were renewed; and (b) that of all the individuals who reviewed the Plaintiff, their reviews of him were markedly more negative (allegedly after they learned of the Plaintiff's complaints about racial discrimination).

Decisionmaker knowledge of protected activity is important to a retaliation claim

- *Goudeau v. Nat'l. Oilwell Varco*, 793 F.3d 470 (5th Cir. 2015)
  - Reversed SJ on ADEA/TCHRA age discrimination claim. Lots of good language in it for Plaintiffs lawyers.
  - But, affirmed SJ on retaliation claim because: (a) 8-10 month time gap between alleged protected complaint and termination; and (b) (most critically) lack of evidence the decision-maker – who was the target of the complaint – ever knew about the complaint before he decided to fire the Plaintiff.

Adequacy of Pleading "Adverse Employment Action"

- *Thompson v. City of Waco*, 764 F.3d 500 (5th Cir. 2014)
- Reversing dismissal for failure to state a claim in a discrimination case.
- Police detective whose complaint alleged that his job was stripped of the "integral and material responsibilities of a detective" such that he "no longer functions as a full-fledged detective [and] is, effectively, an assistant to other detectives", adequately pleading an adverse employment action, for 12(b)(6) purposes.

Adequacy of Pleading, cont'd

- Thompson alleged more than "mere loss of some job responsibilities".
- Judge Jerry Smith dissents because "the law of this circuit imposes a 'strict' standard, one that has been recognized as the most stringent among our sister courts, with only the Eleventh Circuit having a comparable one."
- Important case for pleading retaliation claims, as these facts were found sufficient to establish adverse action under an ostensibly tougher standard.

Pretext Evidence Relevant to Demonstrating PFC Causation

- *Bosque v. Starr County, Texas*, 630 Fed. App'x 300, 2015 WL 7434292 (5th Cir., Nov. 23, 2015)
  - First amendment retaliation case
  - Trial court erred by discounting pretext evidence in prima facie case determination

Bosque, cont'd

- "Although this court has occasionally considered evidence in this neatly separate manner . . . attempting to cabin pretext evidence into the third prong is contrary to other precedent and commonsense [sic]."

- Such evidence relevant to the prima facie case involved Saenz's own inconsistent and substanceless explanations for why he terminated Bosque.

A WC Retaliation Claim Cannot Be Brought Against An Employer That Does not Provide WC Coverage To the Plaintiff, Even If It Is A Joint Employer With An Employer That Does

- *Burton v. Freescale Semiconductor, Inc., 798 F.3d 222* (5th Cir. 2015)
  - Manpower hired Burton and assigned her to Freescale as a temp.
  - Manpower provided workers comp insurance for the temps it assigned to other companies, including Freescale.
  - Burton filed a WC claim and was fired. She sued both companies.

A WC Retaliation Claim Cannot Be Brought Against An Employer That Does not Provide WC Coverage To the Plaintiff, Even If It Is A Joint Employer With An Employer That Does, continued

- The Fifth Circuit held that Freescale was not a proper defendant, because its WC insurance did not cover Plaintiff, only Manpower's did. That Freescale was a "subscriber," in that it provided WC insurance for its permanent employees, was not enough.

- This was about the only good news for Freescale in the case. Otherwise, the case contains a cornucopia of great language and holdings for the Plaintiff.

Third Party Retaliation

- *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553 (5th Cir. 2015)
  - Zastrow, who owned a body shop, bought parts from Mercedes Greenway at a 25% discount.
  - Zastrow had inspected a car in 2012, unaware that it was the subject of a pending arbitration against Mercedes Greenway.
  - The plaintiffs in that case were suing Greenway for many claims, including race discrimination and retaliation.

Zastrow, cont'd

- Zastrow identified numerous problems with the car, and the plaintiffs' counsel asked if he would serve as an expert.
- In January 2013, a Greenway employee called him, advising him not to sit for the deposition, warning that he would regret it.
- Zastrow testified, and one day later Greenway called and said he could no longer buy parts from it.

Zastrow, Part 3

- The Fifth Circuit found:
  - Zastrow enjoyed protection from retaliation because he testified in support of the customers' underlying discrimination claim.
  - Greenway's refusal to contract with Zastrow, as punishment for his involvement in the underlying claim, could be an actionable adverse action.
  - Summary judgment therefore reversed on the retaliation claim, and case remanded for further proceedings.

Questions?

Andrew S. Golub
Dow Golub Remels & Beverly, LLP
9 Greenway Plaza, Suite 500
Houston, Texas 77046
asgolub@dowgolub.com

Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
mark@osattorneys.com