Employer Retaliation Policies and the Retaliation Catch-22

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Date : April 15, 2014

Deborah L. Brake, *Retaliation in an EEO World*, 89 **Ind. L.J.** 115 (2014).

Whistleblowers and workplace retaliation victims continue to make headlines in the national media. From Edward Snowden to NFL players Chris Kluwe and Jonathan Martin, employees who speak out against what they perceive as employer or coworker wrongdoing often generate significant disagreement among the public. Professor Deborah L. Brake has done as much as anyone in legal scholarship to highlight some of the limitations of workplace retaliation law. Her most recent article on the subject sheds light on a relatively unnoticed limitation.

One of the more frequent criticisms of the courts' handling of retaliation claims is the standard to which retaliation plaintiffs are held. An individual who is retaliated against for opposing unlawful discrimination need not establish that the conduct opposed was actually illegal under federal law. Instead, the individual must simply establish that she reasonably believed that the conduct complained of was unlawful. If a reasonable employee would not have believed that the employer's conduct was illegal, the employee's conduct is unprotected under the law and the employer is free to retaliate against the employee for the employee's opposition. As Brake notes, much of the criticism to date has focused on the fact that courts tend to hold retaliation plaintiffs not to the standard of a reasonable employee, but to that of a reasonable employee who has taken a law school course on employment discrimination, thus leaving many employees unprotected when they oppose what they believe to be discriminatory conduct.

But to Brake, this represents only half of the equation. Her new article focuses "on the interplay between retaliation doctrine and employers' internal discrimination policies." Brake examines how employers' internal policies strongly encourage employees to file internal complaints of sexual harassment early on—before the harassment becomes more severe. Unfortunately, the policies often define sexual harassment more broadly than the term is defined under federal law. Brake notes that employer's sexual harassment policies often incorporate the definition of sexual harassment used in a set of EEOC guidelines from 1980. Brake points out that this definition "encompasses a much broader category of conduct than what a court would necessarily find to be actionable." The effect of these policies, then, is to encourage employees to complain about conduct that is not actually unlawful under federal antidiscrimination law. By complaining, the employees increase the odds of being retaliated against. Yet, because courts often hold retaliation plaintiffs to something stricter than a reasonable person standard, these employees are left unprotected from retaliation.

Intrigued, I decided to look at my own institution's sexual harassment policy that is provided to student-employees. This is a document whose target audience is (as a general matter) young people with limited experience in the adult workplace. These student-employees likely know little about employment law and have little context in which to place their interactions with coworkers and supervisors. Therefore, the university's internal EEO policy seems particularly likely to influence the decision of this particular kind of employee, who may be seeking to understand her rights and to plan her course of action when confronted with objectionable conduct. Therefore, I was interested to see what sort of guidance my institution provides its employees. And, lo and behold, the harassment policy

contains the same overly broad 1980 standard Brake mentions. Thus, student-employees are given a somewhat skewed and employee-friendly view of what qualifies as sexual harassment. The policy then goes on to provide the following advice to student-employees who believe they may be victims of harassment: "[d]on't delay" in reporting harassment because "if you delay action, the harassment is likely to continue." But the policy is, in effect, encouraging unsophisticated employees to report behavior that a court may very well find no reasonable employee could have believed was actually unlawful while at the same time increasing the likelihood that the employer might retaliate against the employee for reporting in the first place. (For the record, I have no reason to think that my employer would do this. I'm talking about employers in the generic sense.)

Brake also discusses a related problem with the failure of employer EEO policies to track legal standards. EEO policies sometimes employ fairness- or civility-focused language, thus encouraging employees to report unfair or uncivil workplace behavior. But generalized complaints about unfairness or incivility in the workplace are insufficient to put employers on notice about potential violations of antidiscrimination law. The effect, as Brake notes, may be to "ensnare employees who use the terminology of human resources and EEO policies to express their complaints instead of the rights-claiming language of the underlying statutes" and who end up being retaliated against.

Too often, legal scholars focus on the flaws of prevailing judicial or agency approaches to discrimination and retaliation law without considering how employers communicate these approaches to their employees. Brake's article looks at the side of the coin that most authors have ignored to the point. The result is an illustration of the Catch-22 that employees may find themselves in as a result of the interplay between judicial interpretations of statutory antiretaliation provisions and employer policies.

Cite as: Alex B. Long, *Employer Retaliation Policies and the Retaliation Catch-22*, JOTWELL (April 15, 2014) (reviewing Deborah L. Brake, *Retaliation in an EEO World*, 89 **Ind. L.J.** 115 (2014)), https://worklaw.jotwell.com/employer-retaliation-policies-and-the-retaliation-catch-22/.