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Obstructing EEOC Investigation May Constitute Adverse Employment in Retaliation Case

Courts have held Title VII or other similar statutes prohibit certain post-employment acts reasoning that the term "employee" includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.

By **Jeffrey Campolongo** | August 22, 2019



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A seldom used tool in the employment lawyer's toolbox is the post-employment retaliation provisions of Title VII. Under Section 704(a) of Title VII, a plaintiff is entitled to bring a retaliation action against a former employer for alleged retaliation that occurs even after the employment relationship has ended, see *Charlton v. Paramus Board of Education*, 25 F.3d 194, 200 (3d Cir. 1994). Courts have held Title VII or other similar statutes prohibit certain post-employment acts reasoning that the term "employee" includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.

The framework for post-employment retaliation claims is essentially the same as generic retaliation claims. A plaintiff must establish a prima facie case by demonstrating that: he engaged in an activity protected by Title VII; the employer

took an adverse employment action against him; and there was a causal connection between his participation in the protected activity and the adverse employment action.

The Eastern District of Pennsylvania recently grappled with a post-retaliation dispute involving a private Quaker school on the main line, Friends' Central School (FCS). The situation involved two former teachers who were fired by the school amid allegations of harassment, discrimination and retaliation. See *Eure v. Friends' Central School*, Civil Action No. 18-1891 (E.D. Pa. Aug. 5, 2019). Plaintiffs Ariel Eure and Layla Helwa, sued after the school allegedly suspended then discharged them from their teaching positions at FCS, according to the allegations in the complaint. The dispute arises from a planned pro-Palestinian talk with students on campus that the two teachers organized that was suddenly canceled at the last minute because of backlash from students, parents, and faculty members who viewed discussions of Palestine to be anti-Semitic.

After FCS canceled the planned event, students organized a walk-out with approximately 65 students, the plaintiffs and at least three other teachers in attendance. The plaintiffs were instructed by FCS administrators to not attend because it would be "bad" for them and further suggested that, "as teachers of color," the plaintiffs needed to trust the administration, who had more experience in a private school setting than did the plaintiffs. The student-led discussion occurred and was attended by a dozen faculty members including the plaintiffs. As a result, FCS informed the plaintiffs that they were being placed on administrative leave, effective immediately, due to their "single-minded approach to a complicated issue."

The two teachers requested that an investigation be initiated into the reasons for being placed on administrative leave, suspecting possible discrimination. FCS hired an outside investigator to investigate the plaintiffs' suspensions. Meanwhile,

the plaintiffs filed an Equal Employment Opportunity Commission (EEOC) charge. FCS communicated with families and alumni that FCS had “very real concerns about the conduct of the plaintiffs for their disregard of [FCS'] guiding testimonies, including community peace and integrity” and communicating that the plaintiffs were on “indefinite paid administrative leave” while a review was underway. FCS gave official statements categorizing the plaintiffs as employees who failed to “follow explicit directives.”

Shortly thereafter, FCS sent termination letters to the plaintiffs which contained no specific reason for the termination. After they were fired, FCS released additional public statements regarding the plaintiffs' termination, reiterating that their contracts would not be renewed and that the school was to be named in a lawsuit “connected with an employment issue that took place last February.”

In their lawsuit, the teachers accused FCS of singling them out for participating in issues involving race relations at the school, referencing several instances where white co-workers ignored directives and had complaints lodged against them, but those white co-workers were never placed on leave or fired. The plaintiffs alleged that they were suspended and later fired as a result of their race, color and sex. They claimed that the extensive media coverage of their suspension and termination, as well as the multiple statements made by FCS, lowered their reputations in the community and prevented them from securing gainful employment following their termination.

FCS moved to dismiss all claims but was mostly unsuccessful. The district court first analyzed the hostile work environment and discrimination claims based on race and found that such claims could proceed. Claims that FCS never punished white co-workers who made transgressions such as ignoring directives, failing to attend mandatory staff meetings, and neglecting to turn in student grades in a timely manner, was sufficient to draw an inference of differential treatment based

on race. The court pointed out that these acts, while not necessarily overt acts of discrimination, when viewed in the totality of the circumstances, constitute facially neutral acts of discrimination based on race or color. The plaintiffs were seemingly disciplined more harshly than were white co-workers, according to the decision.

On a side note, FCS argued that the plaintiffs' claims were barred under the establishment clause of the First Amendment. While the decision does not go into any detail for why FCS advanced this particular argument, it's reasonable to assume that the Quaker school was challenging the claims based on Title VII's ministerial exception. Courts have held that clergy members generally cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act. See EEOC's compliance manual section on religious discrimination. This "ministerial exception" comes from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. The exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship or instruction.

Here, the plaintiffs contended that any mention of the school's Quaker principles was merely to provide background information to "depict the nature of the environment" described in the complaint. In a footnote, the district court agreed that any mention of religion in the complaint was intended to provide background information and, therefore, did not implicate the establishment clause.

In looking at the actions taken by FCS after the plaintiffs were fired, the court held that retaliatory acts by a former employer that impede a plaintiff's current or future employment prospects may constitute an adverse employment action. The court's opinion offered an employee-friendly interpretation of the Supreme Court's landmark decision in *Burlington Northern & Santa Fe Railroad v. White*, 548 U.S. 53, 68 (2006). *Burlington* held that Title VII's anti-retaliation provision was not "limited to discriminatory actions that affected the terms and conditions of employment." Instead, the court held that anti-retaliation protection can extend beyond workplace-related or employment-related retaliatory acts and harm. In light of this, a plaintiff's retaliation action under Title VII need only show that a reasonable employee would find the alleged actions "materially adverse," meaning the actions "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

In this case, the court found that there were at least two distinct adverse employment actions that fit within the post-employment retaliation framework. First, the defendants' public statements concerning the reasoning and nature of the teachers' suspension and firing lowered their reputations in the community and prevented them from securing gainful employment. Second, the way that FCS instructed teachers to respond to EEOC questions regarding the open investigation, including suggesting they express support for the school and telling teachers to direct EEOC investigators to FCS' communications office, may have constituted an adverse employment action. The plaintiffs failed to persuade the court, however, that the communication alerting FCS families that an off-campus meeting was not school-sponsored was anything more than a trivial inconvenience.

On the whole, the district court's view on what constitutes post-termination adverse actions appears to be quite protective of employee rights. In particular, the court's view on "obstruction" with an EEOC investigation will raise plenty of eyebrows. One additional takeaway, having less to do with the decision itself, is the fact that the plaintiffs did not appear to allege that their actual termination was also a form of retaliation. As a practical note, if the facts support a post-termination retaliation claim, why not allege that the firing is retaliatory as well. In this case, the facts seem to support it which begs the question as to why it was not pursued.

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