Employment Law

Post-Employment Retaliation Is Actionable Under the ADEA

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Losing a job is painfully awful. For anyone who has been fired, one of the last things you want to worry about is your former employer fighting your unemployment. Chances are, if that happens, you are likely going to need to hire a lawyer. The process will get prolonged. You may not prevail. The list of reasons goes on and on.

Making matters worse is when your former employer fights your unemployment claim out of spite, and even worse, in retaliation for charging the company with discrimination. This falls into the category of post-termination retaliation. The term itself seems somewhat oxymoronic. After all, how can one suffer a materially adverse "employment" action if she is not even on the company's payroll anymore? For many years, courts were reticent to credit allegations of post-termination retaliation for this very reason.

Our own U.S. Court of Appeals for the Third Circuit once quipped that an employee could not suffer adverse employment action after or contemporaneous with the protected activity because "quite obviously, given the nature of unemployment benefits, her employment was terminated before, not after or contemporaneous with, her filing for unemployment compensation. Once her employment was terminated it was not possible for her to suffer adverse employment action," as in G*lanzman v. Metropolitan Management*, 391 F.3d 506, 5016 (3d Cir. 2004).

Since that decision, the U.S. Supreme Court weighed in on the definition of an "adverse employment action" in the context of a Title VII retaliation claim. The Supreme Court held "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse," in *Burlington Northern & Santa Fe Railway v. White,* 548 U.S. 53, 68 (2006). "Materially adverse" was defined to mean the adverse employment action would have dissuaded a reasonable worker from filing a charge of discrimination. As a result of the Supreme Court's expanded definition of adverse action, courts in this jurisdiction, as well as others, have permitted plaintiffs to base their prima facie case of Title VII retaliation on their former employer's opposition to their unemployment claims.

The most recent example of post-termination retaliation came up in the context of the Age Discrimination in Employment Act (ADEA). In the case of *Roe v. The McKee Management Associates*, No. 16-CV-5520 (E.D. Pa. Feb. 21), Carolynn Roe alleged that her former employer, The McKee Management Associates Inc., fired her and then retaliated against her, after she was fired, by contesting her unemployment. She also alleged that the company retaliated against her by refusing to give her a promised positive reference. She believed that the foregoing retaliation was the result of her refusing to sign a standard release of claims against her former employer, including claims under the ADEA and the Pennsylvania Human Relations Act (PHRA).

Interestingly, Roe did not allege any protected conduct before her termination. The extent of her alleged protected activity consisted of refusing to sign a release of discrimination claims against her former employer, and informing her former employer she intended to file charges of age discrimination, all of which took place after she was terminated. The court examined whether the refusal to sign a release was deemed protected activity under the ADEA. In order for the activity to be protected, the refusal to sign a release must be sufficiently specific to confer opposition to a prohibited practice. According to the court, Roe's refusal to sign this release did not communicate specific opposition to age discrimination. Thus, the activity was not protected.

Roe's stated intent to sue for age discrimination, on the other hand, was sufficient to communicate her opposition. While a general complaint of unfair treatment does not translate into a charge of illegal age discrimination, the court said, Roe's attorney clearly informed her former employer that she "intended to file a claim of age discrimination with the appropriate governmental agency." In this instance, Roe satisfied the first element of her prima facie case for post-termination retaliation.

Turning to the second element, it was incumbent upon Roe to allege a materially adverse employment action. Per the opinion of the district court, there were two separate incidents of adverse action: her former employer opposed her unemployment benefits claim, and refused to give her a promised positive reference. These actions were alleged to have occurred after it was promised that the employer would not contest unemployment benefits and agreed to provide a positive reference. Here, Roe received unemployment benefits for several weeks until the employer contested it. After Roe's lawyer told the employer of her intent to sue for age discrimination, it was then that the employer made her "performance" the subject of her termination before the Unemployment Compensation Board of Review. As a result of the contest, her benefit unemployment payments stopped. Eventually, she prevailed on her unemployment claim.

The combination of contesting the benefits (after promising not to), along with the sudden cessation of benefits after they began were certainly factors the court considered in finding a material adverse action. The court wrote "we can plausibly infer at this stage the risk of losing unemployment benefits payments would dissuade a reasonable worker from filing a discrimination charge." The court seemed to be particularly troubled by the sudden interruption of Roe's benefits, begging the question of whether a contest by the employer from the inception would have also constituted an adverse action.

On the issue of the promised (but not delivered) positive reference, the district court found that the employer's failure to provide Roe with a reference constituted an adverse employment action because it impacts her ability to obtain future employment. Citing Third Circuit case law, the court held an individual "may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act ... arises out of or is

related to the employment relationship," as in *Charlton v. Paramus Board of Education*, 25 F.3d 194, 200 (3d Cir. 1994). In instances where the post-employment conduct affected the plaintiff's future employment opportunities, courts have found there to be a cognizable retaliation claim.

Here are a couple of hot takes from this recent decision. First, post-termination retaliation exists and constitutes a viable cause of action when based on valid protected activity. Whether it be in the context of Title VII or the ADEA (and, by extension, the ADA), an employee can be harmed by post-employment activity. Second, refusing to sign a release does not constitute protected activity in and of itself. Refusing to sign a release because you are opposing unlawful discrimination, however, may constitute protected activity. Third, an employer who contests unemployment after promising not to (especially after benefits begin) does so at the risk of retaliating against the employee. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.
