PUBLICATION

Be Warned About Warning Employees [Ober|Kaler]

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Why worry about a warning? The Fourth Circuit's recent ruling in *Maron v. Virginia Polytechnic Inst. & State Univ.*, No. 12-1146 (Jan. 31, 2013), is very enlightening in this regard and should pique the interest of all employers and employment law practitioners. In an interesting and perhaps overlooked unpublished opinion, the U.S. Court of Appeals for the Fourth Circuit potentially shifted the landscape of retaliation claims under Title VII. And it all started with what the defendant in that case considered an innocuous warning. Is your curiosity piqued? Then read on.

To begin with, the anti-retaliation provision of Title VII prohibits discrimination against an employee on the basis of their opposition to any unlawful employment practice, or participation in an investigation regarding said employment practice. *See* 42 U.S.C. §2000e-3(a). In order to establish a viable claim, an employee must demonstrate that she (1) engaged in a protected activity; (2) her employer acted adversely against her; and (3) the protected activity and the adverse action were causally connected.

Most practitioners accept the fact that the battle waged is typically not with the first prong of the standard. Most complaining employees, and their counsel, are capable of stating a sufficient basis for their engagement in a protected activity (such as making an internal complaint regarding workplace practices, or filing an administrative complaint with the EEOC). The harder bridge to cross for many employees is meeting the burden of the third prong by showing the causal connection between the protected activity and the adverse action. But what about the second prong of the standard? Many would suggest what constitutes an “adverse” action is fairly obvious. A termination? Yes. A demotion? Sure. A salary reduction, or any assortment of consequential negative outcomes would certainly constitute an “adverse action.” But what about merely warning an employee that her constant complaints were derailing her career?

Here is what happened in *Maron v. Virginia Polytechnic Inst. & State Univ*. In that case, three complaining employees alleged their employer had violated the Equal Pay Act by paying female employees less than their male counterparts. One particular plaintiff, Shana Maron, also protested that she had been retaliated against in violation of Title VII of the Civil Rights Act of 1964 because of her opposition to the unlawful employment practices of her employer. After the jury's deliberation, verdicts were returned for two of the plaintiffs, including Ms. Maron. Thereafter both plaintiffs were awarded monetary damages for their wage claims. Ms. Maron also received a jury award on her retaliation claim.

It would appear from the facts of the case that Ms. Maron frequently complained by email to Elizabeth Flanagan, the University's Vice President of Development and Relations, who happened to be the fi nal decision maker as it related to establishing salaries for all employees (such as Ms. Maron) who worked as fundraisers. Ms. Maron contended that as a result of her complaints to Ms. Flanagan regarding unequal treatment, she received a disciplinary notice and was cautioned by Ms. Flanagan, in so many words, not to make waves, that she was exercising poor judgment, and that her pursuit of claims would “ruin her career.” *Maron*, No. 12-1146 at *10. Whether these alleged comments were meant to convey friendly advice, poorly phrased, or constituted retaliatory threats was certainly a point of contention during the trial.

Subsequent to post-trial motions, the district court set aside the jury verdicts, and ruled (among other things) as a matter of law that Ms. Maron's retaliation claim was not viable. The Fourth Circuit ultimately reversed the district court's entry of judgment with respect to Ms. Maron's retaliation claim. The critical question on appeal was whether such cautionary statements, or “mild slights,” as the defendant in that case saw it, could actually constitute an “adverse action.”

Not all actions are “adverse” actions under Title VII. In order to reach that threshold, “the employer's actions must be deemed as “materially adverse” to the employee and capable of dissuading a reasonable employee from complaining about discrimination.” See Maron, No. 12-1146 at *9-10 (*citing Burlington No. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Under the *White* rubric, materially adverse actions do not include “petty slights, minor annoyances, and simple lack of good manners.” *White*, 548 U.S. at 64, 68. Those types of action do not ordinarily rise to the level of the sort of conduct that would deter an employee from complaining. *Id.*

While the defendant in *Maron* characterized the supervisor's statements as mild discourtesies or verbal slights, the Fourth Circuit disagreed. In remanding the case to the district court, the Fourth Circuit observed that a jury could have found that the supervisor's statements “constituted a materially adverse action because they could have dissuaded a reasonable employee from making or reporting an incident of discrimination.” *Maron*, No. 12-1146 at *10-11 (citing *White*, 548 U.S., at 68). Coupled with other allegations cited by the plaintiff, the Fourth Circuit concluded that in the light most favorable to the plaintiff a jury could have determined that she suffered a materially adverse employment action that were causally connected to her earlier reports of sex discrimination. Accordingly, the Fourth Circuit ruled that the district court erred in entering judgment as a matter of law in favor of the defendant university with respect to the plaintiff's retaliation claim.

Filing an administrative complaint under the banner of a fair employment practice statute does not entitle an employee to continued job protection if that employee is a poor performer. However, communications with such an employee must be carefully managed. *Maron* reinforces one of the challenges routinely faced by employers and human resources professionals in dealing with employees who have filed internal or external complaints regarding unfair mistreatment. Namely, how should managers and supervisors engage employees regarding performance concerns without risking the escalation of a general complaint to a charge of workplace retaliation? There is no easy answer and each case must be analyzed individually. However, it is abundantly clear that words do indeed matter and that any verbal directives to an employee that can be construed or characterized as having a probability of deterring that employee's participation or opposition to an unfair workplace practice carries consequences. Perhaps the warning issue addressed in *Maron* is something that practitioners should “warn” their clients about, whether their client is issuing or receiving the warning.