ALICE B. NEWMAN

ATTORNEY & COUNSELOR AT LAW
ONE BOCA PLACE
2255 GLADES ROAD - SUITE 324 ATRIUM
BOCA RATON, FLORIDA 33431-8571
TELEPHONE 561-482-0680
FAX 561-482-0171
www.alicenewman.com

EMAIL alice@alicenewman.com
ADMITTED TO PRACTICE IN NY, NJ & FL

OF COUNSEL TO:
RUBENSTEIN, MEYERSON, BLAKE & FOX, P..A.
180 SUMMIT AVENUE, SUITE 207
MONTVALE, NJ 07645-1722
TELEPHONE 201-802-9202
FAX 201-802-9201

PLEASE REPLY TO:
☐ BOCA RATON, FL OFFICE

☐ MONTVALE, NJ OFFICE

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EMPLOYMENT DISCRIMINATION AND RETALIATION BY EMPLOYERS

For as long as federal law has prohibited discrimination in the workplace, it also has separately prohibited punishing, or "retaliating against," an employee who opposes the prohibited discrimination. Employment discrimination can occur on the basis of factors such as race, sex, and religion. Usually, there is an anti-retaliation provision found in the same laws that prohibit the underlying discrimination.

There are dozens of federal statutes with anti-retaliation provisions. The policy of protecting those who object to what they perceive as unlawful discrimination is so ingrained in federal civil rights law that it has even been read into laws by implication, even though it was not there in black and white. In 2005, the United States Supreme Court ruled that Title IX, which prohibits sex discrimination in educational programs or activities receiving federal financial assistance, also implicitly prohibits retaliation against individuals who oppose conduct that allegedly violates Title IX.

Court Expands Retaliation Claims

In the 2006 term, the Court took the additional step of articulating an expansive standard for determining what types of employer conduct, when accompanied by a retaliatory motive, can support a cause of action for retaliation. The underlying case concerned a claim of sexual harassment, but the ruling has ramifications for all claims based on retaliation for opposing civil rights violations. As the 2006 case itself demonstrated, with the right set of facts it is possible for a plaintiff to be successful on a claim of retaliation, even though the underlying claim of discrimination has failed. The two types of wrongful conduct are independent of one another.

In this case, the plaintiff was the only woman working in the track maintenance department of a railroad. She asserted that she was subjected to sexual harassment by her supervisor, in the form of insulting and inappropriate remarks. Because the employer took prompt corrective action, including punishment of the harassing supervisor, it had no liability for the harassment claim itself.

However, even as the employer took its corrective action, it also reassigned the plaintiff from her job as a forklift operator to a harder, dirtier, and generally less desirable job. Later, the railroad also suspended the plaintiff for over a month without pay for alleged insubordination, although, in time, the railroad's own grievance committee found no insubordination and awarded her back pay for the period of the suspension.

In a unanimous decision, the Court rejected requirements that some lower courts had imposed for showing prohibited retaliatory conduct, and allowed a jury verdict for the plaintiff on her retaliation claim to stand. Under the now-abandoned tests, the conduct either had to amount to failing to hire, failing to promote, or termination, or it at least had to materially change the "terms and conditions" of employment. Instead, the Court adopted a rule by which *any adverse retaliatory action may support a retaliation claim*, as long as it is reasonably likely to dissuade employees from engaging in protected conduct.

Context Is Significant

As the Court put it succinctly, in determining when an employer action constitutes prohibited retaliation, "context matters." In a hypothetical example mentioned by the Court, while a change in the schedule of many employees may have little impact, such a change as a form of retaliation may be so significant to the mother of school-age children that it would deter her from complaining about discrimination at work. Similarly, an employer's failure to invite an employee to lunch is normally not the stuff of retaliation, unless it was a weekly lunch meeting that was important to any employee's advancement in the company.

A petty slight or minor annoyance is still not enough to support a claim for retaliation. That said, the risk of confusing such behavior with more significant adverse action is significant enough that employers are now well advised to give their managers the following straightforward direction: Do not do anything to punish someone for having opposed an employer practice that is alleged to be discriminatory.

ROTH IRA CONVERSIONS

A traditional individual retirement account (IRA) is funded with before-tax contributions and grows tax-deferred, but not tax-free. (Taxpayers with a 401(k) plan provided by their employers, and who fall into higher income tax brackets, generally cannot deduct an IRA contribution.) Beginning at age 70-1/2, the individual must take minimum distributions from a traditional IRA, which are taxed in full at the income rate then applicable to the taxpayer.

By contrast, contributions are made to a Roth IRA with after-tax money. If the account has been held for at least five years, the accumulated principal and interest in a Roth IRA may be withdrawn tax-free once the individual reaches 59-1/2. Unlike a traditional IRA, there are no mandatory minimum distributions for a Roth IRA.

The ability to make contributions to a Roth IRA is phased out for couples with a modified adjusted gross income of between $150,000 and $160,000 ($95,000 to $110,000 for individuals). While those contribution restrictions will remain in place, a new law that goes into effect in 2010 will open up the Roth IRA to higher-income taxpayers by allowing them to convert a traditional IRA account into a Roth IRA account, thereby benefiting from the Roth features when money is withdrawn. A current provision limiting Roth conversions to those taxpayers with adjusted gross incomes of under $100,000 will no longer be in effect.

When a conversion occurs, the individual withdraws funds from the traditional IRA account, reports those funds as income, and transfers them to a Roth IRA. The conversion must be done before December 31 of the current tax year. If the earlier IRA contributions were taken as deductions, taxes will be due on both the principal and the earnings. Otherwise, taxes will be due only on the earnings. In any event, funds can be converted from a traditional IRA to a Roth IRA without incurring the 10% penalty for early withdrawals.

Why worry now about a law that will not go into effect until 2010? Because proper planning and saving in a traditional IRA between now and then can result in a significant nest egg that can be converted into a Roth IRA when the income restrictions are lifted in 2010. For example, given current and projected limits on contributions to a traditional IRA, a married couple in their fifties, with at least one spouse working, could contribute over $50,000 to a traditional IRA over the next few years, then convert those funds to a Roth IRA, and thereafter reap the benefits of that type of retirement fund. Since some taxes will be due whenever the conversion takes place, it also is advisable to save up some funds outside of the account for that day of reckoning with the IRS.

A tax professional can help you determine whether and when to convert a traditional IRA into a Roth IRA, considering factors such as your current and future tax brackets and income, when you want to begin making withdrawals, and your estate plans in general.

COMMERCIAL LANDLORD SUED FOR UNSAFE CONDITIONS

A silkscreen printing company with one employee rented a building from a commercial landlord. The employee suffered permanent injuries after falling from the stairs leading to the basement of the building. In the ensuing lawsuit against the landlord, the employee alleged that the fall happened because the stairs were wobbly, had no handrail, and had low ceiling clearance. The court found that the landlord had no liability.

Bearing in mind that there was no direct contractual relationship between the employee and the landlord, there could be a duty of care running from the landlord to a third party (such as the employee) only in one of two circumstances: if the landlord bound itself by contract (i.e., in the lease) to make repairs and then did so negligently, or if the dangerous defect was in an area over which the landlord retained control, such as a common area. The case before the court presented neither of these circumstances.

The fall occurred in an area clearly leased and controlled by the tenant. In unambiguous language, the lease provided that the tenant would have exclusive control of the premises and that the tenant had the obligation to maintain the building at its own expense. It was necessary under the terms of the lease for the landlord to approve of repairs made by the tenant, and the landlord reserved the right to come onto the premises to make repairs that were "compatible with the lessee's use of the premises." Nonetheless, the result of the negotiations between the landlord and tenant, which were small entities with equal bargaining power, was that the responsibility for maintaining the building in a safe condition fell to the tenant, not the landlord. The employee's remedies for his injuries were effectively limited to workers' compensation benefits, for which he was qualified and which he had begun to receive.

It made all the difference to the outcome that the lease was commercial, rather than residential. A commercial lease is essentially a business transaction, a contract for possession of property, and the "ancient" common-law rule is still observed, in keeping with the maxim "let the buyer (tenant) beware." In such a case, the terms of the agreement are most important.

By contrast, with regard to residential leases, the law has evolved more favorably for tenants, for various public policy reasons, including disparity in bargaining power between the parties. A duty of care for residential landlords need not be found in the fine print of a lease. Rather, a residential landlord is bound to act as a reasonable person would under all of the surrounding circumstances, including the likelihood of injuries, the probable seriousness of such injuries, and the burden of reducing or avoiding that risk. In short, the employee would have fared better in court if the stairs from which he fell had been in a rented apartment.

COMPUTER FRAUD AND ABUSE ACT

Since 1994, the federal Computer Fraud and Abuse Act (CFAA) has provided civil remedies to complement the original criminal sanctions for the theft and destruction of computer data, fraudulent use of passwords, and various means of committing fraud by unauthorized access to computers. For a typical claim under the CFAA brought against a defendant who violates the statute in an attempt to gain a competitive advantage over the plaintiff, there must be a financial loss of at least $5,000 in order to maintain a civil cause of action.

The ability to obtain injunctive relief under the CFAA is at least as valuable to an injured party as the recovery of damages. To win an injunction, however, the plaintiff must be in a position to prove not just the unauthorized intrusion into the plaintiff's computers, but also specifics as to what information was taken by the defendant and how it was used to harm the plaintiff.

In a recent case, a former officer and an employee of a party supply store were alleged to have gathered information from their former employer's computer without authorization, so as to get a leg up on the plaintiff in their new, competing business. The elements for the claim were in place, except for the critical proof as to what data records of the plaintiff's were accessed and whether such records had been downloaded, copied, or printed by the defendants. The plaintiff business was denied an injunction in federal court because of this gap in its proof.

The case of the competing party-supply businesses offers object lessons for how businesses can best put themselves in a position to take full advantage of the Act if they have been victimized. One advisable technical step is to include an auditing function in a computer system that automatically records what documents have been accessed and what happens to the documents when they are accessed. The resulting "audit trail" can be a valuable piece of evidence in an action under the CFAA. When employees are allowed to work at home on their computers, employers should have policies allowing them to inspect those computers when the employment ends and to retrieve any of their data.

Although technical measures and policies on computer technology are important, simple use of imagination can also produce relevant noncomputer evidence for a CFAA claim. The court in the unsuccessful action by the party-supply store observed that the plaintiff could have presented evidence that the defendants had taken particular actions to the competitive disadvantage of the plaintiff very soon after their unauthorized access to the plaintiff's computers. This would have allowed an inference that secrets had been taken from, and then used against, the plaintiff.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

The legal distinction between an employee and an independent contractor may seem like a subject suitable only for a law school exam, but it has real-life significance for both employers and employees.

Considering just federal taxes, for example, if a worker is an employee, the employer must withhold income tax and the employee's part of Social Security and Medicare taxes. The employer also is responsible for paying Social Security, Medicare, and unemployment taxes on wages. An employee can deduct unreimbursed business expenses if the employee itemizes deductions and the expenses are more than 2% of the adjusted gross income.

If the worker has independent contractor status, however, there is no withholding, and the contractor is responsible for paying the income tax and self-employment tax. In that situation, it also may be necessary to make estimated tax payments during the year. An independent contractor can deduct business expenses, but on a different schedule of the tax return than is used by an employee.

So how do you tell the difference between an employee and an independent contractor? There is no single, quick answer. The particular facts of each case must be examined. However, relevant facts can be grouped into three general categories: behavioral control; financial control; and relationship of the parties.

Behavioral Control

The focus here is on who has the right to control how a worker does the work, rather than simply on the end result of the work. If a business has that right, the worker is an employee; if the worker retains that right, he is an independent contractor. The more that a worker gets instructions or training on how the work is to be done—such as determining what equipment to use, hiring assistants, or deciding where to get supplies—the more likely it is that the worker is an employee.

Financial Control

Apart from the actual performance of work, there is the question of a right to control the dollars-and-cents part of the work. Rather than having a direct financial stake in the business, an employee essentially works for a paycheck and maybe some reimbursed expenses. Some factors pointing more toward an independent contractor status include a worker's significant investment in the work, his or her lack of a right to reimbursement of even high business expenses, and his or her potential to realize a profit or suffer a loss.

Relationship of the Parties

This factor considers how the parties themselves perceive their relationship. While an independent contractor, as the term suggests, is on his own concerning benefits, a worker who is provided insurance, retirement benefits, or paid leave is probably an employee. Sometimes the clearest picture of a worker's status is to be found in a written contract. The parties' intent, as shown in a contract, can be decisive, especially if the other factors do not lead to a conclusive answer.

DID YOU KNOW?

The IRS recently began a pilot project that uses private debt-collection agencies to collect back taxes. The controversial program will employ three private collection agencies to target 40,000 delinquent accounts of taxpayers who are in the red to Uncle Sam for $25,000 or less. The agencies get to keep up to 25% of what they collect.

Criticism of the program includes the fear that tax delinquents will be harassed illegally, even though the agencies will be subject to fair debt collection laws. There is also concern about turning over sensitive personal and financial information to private companies.

If you are one of the 40,000 accounts targeted, the IRS must inform you in writing. However, you will be allowed to opt out at that time and deal directly with the IRS.