J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 6(2) 119-126, 1997-98

GONE BUT NOT FORGOTTEN: IS POSTEMPLOYMENT RETALIATION ACTIONABLE?

DOUGLAS MASSENGILL

DONALD J. PETERSEN

Loyola University Chicago

ABSTRACT

Of the circuits addressing the issue, a majority have ruled that Title VII protection against retaliation extends to former employees. This has occurred despite the fact that Title VII explicitly designates only employees and applicants for employment. Courts that have decided in favor of postemployment protection against retaliation did so based on the belief that Congress could not have intended to deny such protection. On the other hand, the only circuit to have categorically denied this protection based its decision on the lack of mention of former employees in the provision forbidding retaliation against those making Title VII complaints.

Title VII of the 1964 Civil Rights Act provides in part that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [1].

While seemingly straightforward, the antiretaliation provision has engendered a judicial controversy regarding the scope of the protection afforded. Specifically, the question of whether a person no longer employed is entitled to relief has received conflicting answers by the federal appellate courts. Of those addressing the issue, one has ruled that protection against retaliation does not extend beyond

doi: 10.2190/36B7-D2BY-LGUC-VKVF
http://baywood.com

the actual employment relationship; six have ruled that former employees are protected; and one has decided that protection is afforded to former employees in limited situations. To date the U.S. Supreme Court has not resolved this conflict. The purpose of this article is to analyze the reasoning of the various courts concerning the actionability of postemployment retaliation.

POSTEMPLOYMENT RETALIATION NOT ACTIONABLE

Of the two appellate courts that rejected the extension of protection to former employees, the Fourth Circuit has taken the more forceful position, first in *Polsby v. Chase* [2] and more recently, in *Robinson v. Shell Oil Company* [3]. In *Polsby*, the court emphasized three points:

1. The statute explicitly prohibits retaliation against employees and applicants for employment but makes no mention of former employees. Therefore, Congress did not desire to protect that group of individuals.
2. The types of practices forbidden are those specifically related to the employment relationship, i.e., a failure to hire or to in any way discriminate in the terms or conditions of employment. However, according to the court, "[t]itle VII does not redress discriminatory practices, however unsavory, which occur after the employment relationship has ended" [2, at 1365].
3. Title VII provides remedies to "make the person whole." The court concluded it would be very difficult to fashion equitable relief for a person who was the victim of postemployment retaliation. It noted:

> While relief must be in the form of making the former employee whole as if the retaliatory act had not occurred, the equitable means to accomplish this goal are lacking. Such relief would entail calculating future damages and is far too speculative [2, at 1366].

The court went on to state that, while in some cases equitable relief might be determined, the better course of action would be ". . . to allow the former employee to seek either state or other federal law remedies against the *former* employer or the same Title VII remedies against the *prospective* employer who based its decision not to employ the former employee on the fact that she sought Title VII relief from a prior employer" [2, at 1366].

In *Robinson*, the court considered whether it was appropriate to include "former employee" within the definition of employee. First, the court stated that if a statute includes a definition of a term, that definition must apply to all provisions of the statute. It then noted that Title VII defines "employee" as "an individual employed by the employer," not ". . . as an individual no longer employed by an employer . . ." [3, at 330]. Also, it was indicated that the words

used in a definition should be given their common usage. Consequently, ". . . no meaningful argument can be made that the term 'employer' is commonly used to mean 'one who no longer employs the services of others' " [3, at 330].

The court did allow for exceptions to the literal application of the term employee. One exception would be if a literal application of the term would lead to an absurd result. The court rejected the idea that an absurd result could occur, citing the U.S. Supreme Court's ruling that "the absurdity 'must be so gross as to shock the general moral or common sense' " [3, at 329]. The other exception can occur if application of the term would produce some results at odds with the intent of Congress. Here the court relied on its reasoning in *Polsby* [2]. It contended that because Congress had explicitly included "applicant for employment" and not "former employee," it did not intend that the antiretaliation provision protect him/her.

In concluding, the court again revisited its arguments in *Polsby* [2]. It indicated that "[t]he types of practices that Title VII forbids are particularly related to *employment, not* postemployment relationships," and that "[a]dverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge" [3, at 331]. Therefore, adverse actions by a former employer after employment has ended would not be actionable under Title VII.

The Seventh is the only other circuit to decide negatively regarding the application of protection for former employees. In *Reed v. Sheppard* [4], the court decided the plaintiff had no cause of action because the alleged retaliation occurred after she was no longer employed and the activities asserted to be retaliatory were not related to her employment (e.g., harassing telephone calls). Reiterating its own criteria for determining a *prima facie* case of retaliation under Title VII, the court ruled Reed did not engage in a protected activity in that her initial charge of sexual harassment occurred after she was terminated. The court also pointed out that because the alleged retaliation occurred when she was no longer employed, the action could not be an adverse employment action:

> [I]t is an employee's discharge or other employment impairment that evidences actionable retaliation, and *not* events subsequent to his employment [4, at 492].

POSTEMPLOYMENT RETALIATION ACTIONABLE

Seven circuits (including the Seventh, which ruled adversely in *Reed*) have ruled that retaliation against former employees is actionable. In *Charlton v. Parimus Board of Education* [5] the Third Circuit argued that allowing postemployment retaliation might result in considerable harm to the former employee. For example, ". . . postemployment blacklisting is sometimes more

damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued" [5, at 200]. Consequently, the court concluded, victims might be reluctant to file charges if they were afforded no protection against retaliation.

The Fifth Circuit has twice decided that former employees are protected against retaliation. In *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Division* (decided under the ADEA), the court ruled that "[t]he term 'employee' . . . includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship" [6, at 1089]. In a subsequent case, *E.E.O.C. v. J. M. Huber Corporation* [7], the court affirmed its conclusion that former employees could claim unlawful retaliation.

In *E.E.O.C. v. Ohio Edison Company* [8], the Sixth Circuit addressed an unusual issue. The plaintiff charged he had been retaliated against after a third party had informed the employer that he (the plaintiff) was considering filing a claim of unlawful termination. Much of the court's reasoning related to that issue [9], but it also ruled that former employees had the right to file charges of unlawful retaliation. This decision was based on the idea that a narrow interpretation of the word employee would defeat the purpose of Title VII.

Notwithstanding its decision in *Reed*, the Seventh Circuit ruled favorably for the plaintiff regarding postemployment retaliation in *Veprinsky v. Fluor Daniel, Inc.* [10]. Veprinsky charged Fluor Daniel had retaliated against him by refusing to rehire him, giving false information to a subsequent employer, and informing a placement firm he had filed an EEOC charge. Based on the appellate court's decision in *Reed*, the district court hearing the case had ruled all but the "refusal to hire" claim to be outside the coverage of Title VII because of Veprinsky's status as a former employee.

The court of appeals pointed out the following difference between the two cases:

> Conduct that is related to the plaintiff's employment or his effort to gain new employment is not addressed by *Reed*. For the reasons that follow, we believe that post-termination acts of retaliation that have a nexus to employment are actionable under Title VII [10, at 888].

It then pointed out its rationale for extending protection in the above type of situation. The court stated that many violations of Title VII are manifested in unlawful discharge. It then argued that, without sanctions against retaliation, an employer could "punish" those who filed charges by impeding their efforts to find new employment. It then indicated the following potential disparity:

> A narrow construction of the term "employee" would therefore permit the employer to penalize a complaining former employee with impunity yet bar the employer from taking adverse action against any current employee who has filed a charge, even if the complaints address the same type of discrimination. Nothing in the purpose, design, or the legislative history of Title VII suggests that Congress would approve of such an anomalous disparity, particularly when the discharge itself may be the discriminatory act that has prompted the former employee to exercise her statutory rights [10, at 890].

In conclusion, the court ruled that when retaliation negatively affects future employment prospects or in other ways is related to employment, the former employee does enjoy Title VII protection.

The Ninth Circuit has implicitly indicated that former employees have the right to claim retaliation under Title VII. It remanded *O'Brien v. Sky Chiefs, Incorporated* [11] back to the district court for reconsideration of *both* the plaintiff's charge of unlawful termination *and* retaliation. No mention was made of the plaintiff's postemployment status when the alleged retaliation occurred.

In *Rutherford v. American Bank of Commerce* [12], the Tenth was the first circuit to rule on the standing of a former employee to sustain unlawful retaliation under antidiscrimination laws. Relying on previous decisions made by the Fifth and Sixth Circuits under the Fair Labor Standards Act [13], it concluded that the negative impact of failing to allow such claims by a former employee could be severe. Therefore, it determined that ". . . a literal reading of the statute [the term employee referring only to those currently employed] which, if followed, would result in a narrow interpretation of the statute [is] not justified by its legislative history" [12, at 1162]. It then added that "[a] statute which is remedial in nature should be liberally construed" [12, at 1162].

In *Berry v. Stevinson Chevrolet* [14], the Tenth Circuit issued the most recent appellate court decision regarding the issue. In this case the court declined to reconsider its position (as stated in *Rutherford*) that Title VII protects former employees from discriminatory retaliation. The defendants had argued that the U.S. Supreme Court's decision in *E.E.O.C. v. Aramco* required that ". . . a plain or literal reading of Title VII must govern judicial interpretation" [14, at 1324]. The court in the instant case disagreed. It stated that the decision in *Aramco* was based on the *presumption* that laws of the United States would not be applied outside the boundaries of the country. It concluded:

> While *Aramco* and *Rutherford* both interpret the reach of Title VII, their interpretations are rooted in distinct principles of statutory construction. *Aramco* only interprets Title VII with respect to the presumption against extraterritoriality, a tool of statutory interpretation which was irrelevant in *Rutherford*. Consequently, *Aramco* does not undermine *Rutherford*'s holding [12, at 1165].

In *Bailey v. USX Corporation* [15], the Eleventh Circuit also ruled in favor of a former employee's right to bring a charge of retaliation under Title VII. The court based its decision on a "common sense reading in keeping with the purpose of the statute" [15, at 1509]. It recognized that the ". . . language of a statute should be interpreted according to its ordinary, contemporary and common meaning," but concluded that "this plain meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute" [15, at 1509]. The court insisted that excluding former employees would deter from the remedial purposes of Title VII. In a subsequent decision the court reiterated its conclusion regarding postemployment retaliation [16].

DISCUSSION

At the present time there is a division among the circuit courts regarding the issue as to whether or not the nonretaliation provision of the Civil Rights Act applies to former employees. While the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh circuits would extend such coverage to former employees, only the Fourth and Seventh circuits have denied it.

At the nub of the judicial controversy is whether the antiretaliation provision should be read liberally or literally regarding the word "employee." There are important philosophical as well as practical implications to the resolution of the issue. On the one hand, there is the problem of judicial purpose and integrity, i.e., is it the function of the judiciary to make law that Congress did not apparently intend? On the other hand, the question arises whether a literal reading of the antiretaliation provision subverts the purposes of the Civil Rights Act.

While the weight of judicial opinion appears to favor a liberal reading of the antiretaliation provision, logic and judicial purpose is on the side of a more restrictive understanding of it. When statutory language is clear and unambiguous, a court must not go beyond that language and exercise its ingenuity to justify a certain result, even if that result is thought to entail a hardship. An "employee" is defined in the Civil Rights Act as "an individual employed by an employer" and not as a "former employee." The definition controls the meaning of the word "employee" wherever it appears in the statute. Certainly, the language of the definition, i.e., "employed by an employer," refers to one *currently* working, and not a person who is "no longer performing work."

Moreover, the fact that Congress included the words "applicants for employment" in the antiretaliation provision, indicates that the Congress thought of classes of individuals other than "employees" for coverage, and could have easily added "former employees" to the language. The absence of reference to the latter group seems to indicate that it was congressional intent to exclude former employees from coverage.

In addition, Title VII forbids practices that are particularly related to *employment* and not postemployment relationships. Title VII defines an "unlawful

employment practice," in relevant part, as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" [17]. This definition clearly proscribes discrimination with respect to certain aspects of employment and does not redress discriminatory practices after the employment relationship has terminated.

One requirement to establish a *prima facie* case under the antiretaliation provision is the requirement that an employee must suffer an "adverse employment action." That result demands that the conduct occur during the employment relationship—not after it.

The courts that have urged a liberal reading of the antiretaliation provision have argued that if the word "employees" were not construed to include "former employees," the underlying policies of Title VII would be defeated, i.e., to eradicate discrimination in the workplace. None of these court decisions have come to grips with the absence of congressional expression regarding this issue. Instead, they rely on broad considerations of policy. Nevertheless, in the absence of expressed congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning. To do otherwise, the courts, and not Congress, become the lawmakers.

Ultimately, the U.S. Supreme Court will have the responsibility of resolving the controversy among the circuits [18]. Assuming that it favors the literal interpretation position held currently by the Fourth and Seventh circuits, Congress still has the power to case aside such a decision legislatively by clarifying its intent to cover former employees in the antiretaliation provision. Such a result should not, however, be in the province of the courts.

* * *

Douglas Massengill is an Associate Professor of Management at Loyola University Chicago.

Donald J. Petersen is a Professor of Management at Loyola University Chicago. In addition, he is also a practicing labor arbitrator on the national panels of the American Arbitration Association and the Federal Mediation and Conciliation Service. He is a member of the National Academy of Arbitrators.

ENDNOTES

1. Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §200c-3(a).
2. *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992).
3. *Robinson v. Shell Oil Company*, 70 F.3d 325 (4th Cir. 1995).
4. *Reed v. Sheppard*, 339 F.2d 484 (7th Cir. 1991).
5. *Charlton v. Parimus Board of Education*, 25 F.3d 194 (3rd Cir. 1994).
6. *E.E.O.C. v. Cosmair Inc., L'Oreal Hair Care Division*, 821 F.2d 1085 (5th Cir. 1987).

7. *E.E.O.C. v. J. M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991).
8. *E.E.O.C. v. Ohio Edison Company*, 7 F.3d 541 (6th Cir. 1993).
9. The court decided that the plaintiff did have an actionable claim in this regard.
10. *Veprinsky v. Fluor Daniel Inc.*, 87 F.3d 881 (7th Cir. 1996).
11. *O'Brien v. Sky Chiefs, Inc.*, 670 F.2d 864 (9th Cir. 1982).
12. *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977).
13. See *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139 (6th Cir. 1977) and *Hogsdon v. Charles Martin Inspectors of Petroleum Inc.*, 459 F.2d 303 (5th Cir. 1972). The FLSA's antiretaliation provision protects an "employee" but does not mention "applicants" nor "former employees."
14. *Berry v. Stevinson Chevrolet*, 69 FEP Cases 1320 (10th Cir. 1996).
15. *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988).
16. *Sherman v. Burke Construction, Inc.*, 891 F.2d 1527 (11th Cir. 1990).
17. 42 U.S.C. §2000e-3(a); emphasis supplied.
18. Subsequent to submission of our manuscript, the U.S. Supreme Court unanimously adopted the interpretation of the anti-retaliation provision advocated by the Clinton administration and a majority of federal appeals courts in determining that the provision in the Civil Rights Act applied to post-employment situation (see *Robinson v. Shell Oil Co.*, U.S. SupCt No. 95-1376. 2/18/97).

Direct reprint requests to:

Douglas Massengill
Loyola University Chicago
820 N. Michigan Avenue
Chicago, IL 60611