A Timely Analysis of Legal Developments

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Expanding the scope of potential retaliation claims against Massachusetts employers, the Massachusetts Supreme Judicial Court has held that an ex-employee may bring suit for retaliation against a former employer for actions taken after the termination of the employer-employee relationship, including instituting baseless litigation against a former employee.

Massachusetts High Court Expands Retaliation Protection

By Gregory Keating and Carie Torrence

A new Massachusetts Supreme Judicial Court decision expands the scope of potential retaliation claims under the state's discrimination and retaliation statute, the Massachusetts Fair Employment Practices Act. In a case with a long and tortured history, *Psy-Ed Corp. v. Klein*, 2011 Mass. LEXIS 254 (2011), the court concluded that an ex-employee can bring a retaliation claim against a former employer for actions taken after the termination of the employer-employee relationship, and that instituting baseless litigation against an ex-employee can serve as the basis for a retaliation claim.

Kimberly Schive worked for Psy-Ed Corporation from 1993 until 1996, when her position was eliminated in a corporate restructuring. Following her termination, Schive, who is deaf, filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). Psy-Ed's CEO, Joseph Valenzano, requested that another corporate officer (the original co-founder of the company), Stanley Klein, sign an affidavit supporting Psy-Ed's denial of Schive's allegations. Klein reluctantly signed the affidavit in June 1997. Later, Klein apparently had a change of heart. In September 1999, Valenzano and the company learned that Klein had signed a second affidavit in support of Schive's charge. In response, Psy-Ed refused to make additional payments to Klein that had been promised under a separation agreement.

In December 1999, the MCAD issued a probable cause finding in favor of Schive on her discrimination claim. Two weeks later, Psy-Ed and Valenzano filed a complaint against Klein and Schive alleging defamation, civil conspiracy and tortious interference with contractual and business relations. In response, Schive filed a second MCAD charge and a counterclaim alleging retaliation against Psy-Ed.

In 2002, Klein filed a separate complaint against Psy-Ed and Valenzano alleging retaliation. The court found that the retaliation claim was not actionable because Klein had not been employed for more than two years when the alleged adverse action took place.

Supreme Judicial Court's Decision

In parsing the myriad of claims and counterclaims between Schive, Phys-Ed, and Valenzano, the court first addressed whether an employer's post-employment actions

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against a former employee could violate the Massachusetts Fair Employment Practices Act, Mass General Laws Ch. 151B. Reading Section 4(4) of Chapter 151B (it is unlawful for "any person ... to discharge, expel or otherwise discriminate against any person" for exercising rights guaranteed under Chapter 151B) and Section 4(4A) of the statute (it is unlawful for "any person to coerce, intimidate, threaten, or interfere with such other person" from exercising rights under Chapter 151B), the court reasoned that the statute did not require that an employer-employee relationship exist "at the time of the wrongful conduct, or at any other time." Accordingly, the court held that the statute's retaliation protections extended to former employees.

The court next considered whether the lawsuit filed against Schive could serve as the predicate "adverse action" for her retaliation charge. Although the court recognized that Massachusetts citizens have state and federal constitutional rights to seek judicial resolution of disputes, the court distinguished sham and/or baseless lawsuits that are not constitutionally protected. The court concluded that filing baseless or sham litigation, as opposed to "reasonably based but unsuccessful lawsuits," could thus serve as the "adverse action" sufficient to support a claim for unlawful retaliation. Courts in other jurisdictions have reached a similar conclusion.

Relying on the trial court's findings that: (1) the claims brought against Schive were objectively baseless because Psy-Ed and Valenzano failed to present any evidence of damages; (2) Psy-Ed and Valenzano brought the action not to vindicate the alleged defamation, but instead to "retry" Schive's MCAD charge; and (3) there was a mere two-week gap between the MCAD's probable cause finding and the commencement of the company's action against Schive and Klein, the Supreme Judicial Court agreed with the trial court's finding that Psy-Ed and Valenzano brought the lawsuit to retaliate against Schive for her protected activity and affirmed the award in favor of Schive on her retaliation claims.

Lessons for Employers

Retaliation claims are in vogue nationwide. Plaintiffs' attorneys favor them because they very often boil down to factual disputes that must go to a jury. Because an employee may prevail on a retaliation count without a finding of discrimination, retaliation claims are particularly problematic for employers.

The *Psy-Ed* ruling opens the door to new types of retaliation claims against Massachusetts employers based on alleged conduct that occurs long after the end of the employment relationship. These post-termination retaliation claims are not limited to instituting legal action against a former employee who filed a charge with the MCAD. Employers could also be subject to post-termination retaliation claims for providing a negative job reference, reporting misconduct to a regulatory or licensing agency, or informing a former employee's new or prospective employer about the former employee's protected activity. These claims also arise in situations where a former employee applies for reemployment, often by submitting a résumé or application online and receiving an automated response indicating that the company will retain the application and consider the former employee for appropriate openings as they become available. If the company then does not consider the former employee for subsequent open positions, a claim could follow.

To protect against these claims, we recommend that employers:

- Develop and implement strong anti-retaliation policies.
- Educate all managers and supervisors that it is illegal to blacklist or retaliate against a former employee.
- Consider adopting a uniform policy that the company will not provide any information to a subsequent employer other than the position held by an employee and his or her dates of service. At a minimum, a consistent amount of information should be given in response to inquiries by or about former employees.

While employers may be tempted to file a counterclaim against a former employee who has initiated a lawsuit or filed an administrative charge, employers must exercise caution and carefully evaluate the potential claims to ensure that a solid evidentiary basis exists to support the claims and damages, and thoughtfully weigh the advantages of bringing suit. Filing a baseless claim against a former employee could also result in a malicious prosecution action, as well as a retaliation claim. Finally, remember that the strongest evidence of retaliation is generally a close temporal connection between the protected activity and claimed "adverse action."

Gregory Keating is a Shareholder, and Carie Torrence is an Associate, in Littler Mendelson's Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Keating at gkeating@littler.com, or Ms. Torrence at ctorrence@littler.com.