

THOMAS W. RIECK
trieck@rieckcrotty.com
JEROME F. CROTTY
jcrotty@rieckcrotty.com
RONALD P. DUPLACK
rduplack@rieckcrotty.com
DOUGLAS C. CONOVER
dconover@rieckcrotty.com
KEVIN P. BROWN
kbrown@rieckcrotty.com
AMY E. COLLINS
acollins@rieckcrotty.com

RIECK AND CROTTY

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

55 WEST MONROE STREET, SUITE 3390

CHICAGO, ILLINOIS 60603-5062

CHICAGO'S BUSINESS LAWYERS

TELEPHONE
(312) 726-4646

TELECOPIER
(312) 726-0647

FIRM WEB SITE:
<http://www.rieckcrotty.com>

APRIL 2007

THE COURTHOUSE PERSONNEL DEPARTMENT

EMPLOYMENT LAW RETALIATION CLAIMS

Increasingly, employees file claims asserting they were retaliated against by their employer or their fellow employees. In a common law retaliation claim, the employee asserts a violation of a clearly mandated public policy, such as promoting health and safety in the workplace, when his/her employer improperly terminates the employee for filing a workers' compensation claim or blowing the whistle on the employer's unlawful conduct. In a statutory retaliation claim, the employee asserts a violation of a statute prohibiting retaliation, such as the Civil Rights Act, when he/she is retaliated against for exercising rights under the statute. This issue of *The Courthouse Personnel Department* will discuss each type of retaliation.

COMMON LAW CLAIMS

In *Cuberto Gomez v. The Finishing Company, Inc.*, the Court recently decided a common law retaliation claim. In *Gomez*, Curberto Gomez ("Gomez") worked for The Finishing Company, Inc. ("The Finishing Company"). During his employment, Gomez received several promotions and raises. At the time of his termination, he was a supervisor in The Finishing Company's powder-coating plant.

Before his termination, Gomez reported The Finishing Company to OSHA because of high levels of heat, smoke and paint dust in the powder-coating plant. When he was terminated, Gomez was advised his leadership skills were not adequate "... to properly supervise. Unfortunately, you have not developed to a level we expected and do not set a good example for the employees on your shift."

Gomez responded by filing suit, alleging he was improperly terminated for blowing the whistle on Finishing. At trial, a jury awarded Gomez \$111,601, including \$26,601 for lost wages, \$15,000 for emotional pain, suffering and anguish, inconvenience, humiliation, loss of enjoyment of life and loss of self-respect, and \$70,000 for punitive damages. The Finishing Company appealed the jury's verdict.

On appeal, the Seventh Circuit Court of Appeals rejected The Finishing Company's argument that Gomez failed to prove The Finishing Company's legitimate, nonretaliatory reason for terminating Gomez was a pretext for unlawful retaliation. The Court found Gomez had presented sufficient evidence to establish that he had been fired without warning after Finishing was contacted by OSHA because of Gomez's complaint. Moreover, Gomez's work history failed to support a performance-related termination. Thus, The Finishing Company's articulated reasons for its actions were not believable and Gomez was improperly terminated in retaliation for his whistleblowing activity.

Rieck and Crotty, P.C. publishes *THE COURTHOUSE PERSONNEL DEPARTMENT* bi-monthly to keep employers and employees advised of current issues and decisions throughout the United States relating to discrimination, civil rights and other employment law matters which may impact future employment decisions. If you desire additional information concerning any of the articles, please telephone us. Your comments concerning this publication are welcome.

STATUTORY CLAIMS

In *Jensen v. Potter*, the Court decided a statutory retaliation claim. In *Jensen*, Anna Jensen (“Jensen”) was employed as a letter carrier for the United States Postal Service (“Postal Service”). During her employment, Jensen was subject to an unwanted sexual proposition by her supervisor. Jensen reported the proposition to the Postal Service, which investigated her claim and terminated the supervisor.

Shortly thereafter, Jensen became the object of various types of harassment by her fellow employees because of her complaint. One employee called Jensen “the [obscenity] who got the supervisor fired” and stated that Jensen would have to “get off her fat [obscenity] once a new supervisor was hired.” Another employee drove warehouse carts toward Jensen in a threatening manner. Still other employees scratched, spit, and spilled coffee on Jensen’s car on a number of occasions. Jensen continually reported these incidents to the Postal Service. The Postal Service, however, failed to take any action for approximately 19 months.

In response to these incidents, Jensen began to suffer panic attacks and was required to take a medical leave of absence because of stress. Jensen’s asthma also worsened, requiring her to make several trips to the emergency room. Jensen eventually brought a discrimination and retaliation claim against the Postal Service for failing to stop the conduct which caused her various medical problems.

The Court proceeded to find Jensen was subjected to “retaliatory harassment.” In so finding, the Court ruled that employers may be liable for employee retaliation directed at an employee who exercises rights under Title VII of the Civil Rights Act (“Act”) if the retaliation creates a hostile work environment because the Act prohibits such retaliation. If the employer is aware of the harassment and fails to take adequate remedial measures, liability will be imposed. Thus, the Postal Service violated the Act and was liable for retaliation because it failed to prevent the same after Jensen reported the harassing conduct of her fellow employees.

SUPREME COURT MAKES IT EASIER TO ESTABLISH RETALIATION CLAIMS

The Supreme Court of the United States made it easier for employees to bring statutory retaliation claims in its *Burlington Northern & Santa Fe Railway Co. v. White* opinion decided on June 22, 2006. The Supreme Court held statutory retaliation claims can include actions which occur *outside* the workplace. Accordingly, trial courts are now required to decide claims on a case-by-case basis. In doing so, the courts must consider whether “reasonable” employees would be intimidated by an employer’s actions based on the employee’s position and the circumstances of the allegedly retaliatory conduct.

Please telephone a member of the firm if you have a question about either common law or statutory retaliation claims.

* * * * *

Be sure to visit our website at www.riECKcrotty.com to read prior issues of *The Courthouse Personnel Department* and *A Potpourri*.