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How to Prove Causation in a Whistleblower Termination Claim

March 24, 2016

When an employee reports wrongdoing to her employer, it is only natural for her to fear what the consequences of that reporting might be. Employees are protected from whistleblower retaliation under a number of federal and state laws covering a wide range of subject matters: reporting violations of workplace safety law under the Occupational Safety and Health Act, reporting financial fraud under the Sarbanes-Oxley and Dodd-Frank Acts, reporting environmental harms under laws like the Clean Air Act, and many others. And where there are no explicit protections under specific laws like these, state law will often provide a legal claim when an employee is retaliated against for reporting or protesting other illegal acts under a doctrine known as wrongful termination in violation of public policy.

If an employer takes some action against that employee later—whether it demotes, suspends or, more commonly, terminates her employment—a legal claim needs to say more than simply. "I blew the whistle, and later I was fired." Instead this employee has to prove a causal link between her report of wrongdoing and the employer's "adverse action" against her, and such a causal link can often be difficult to show.

Proving a Causal Link

When an employer fires a whistleblower, the employer will almost always provide a neutral or "legitimate" reason for the termination. It might say the employee engaged in some misconduct herself. It might call the termination a layoff and say it has nothing to do with the employee's actions. Or the employer might provide some vague, more neutral reason, such as saying something along the lines of "things aren't working out" or "it isn't a good fit."

In employment law cases, when an employer provides such "legitimate" reasons for a termination, an employee can still prevail on a retaliation claim if they can show the employer's stated reason was actually a pretext for an illegal, retaliatory reason.

I will highlight below a few ways by which an employee can prove a causal link between whistleblowing and termination. I want to emphasize that plaintiffs have the most success when they can provide multiple types of evidence of the kinds discussed below, in ways that reinforce each other.

Evidence of Retaliatory Motive

Direct evidence of a retaliatory motive for firing an employee is the most helpful kind of evidence in whistleblower retaliation cases. "Direct evidence," in this context, means evidence that directly goes to prove the crucial causal link—such as an email stating, "Aaron has been making more and more noise about our accounting practices; we better get rid of him before he finds out what we're *really* doing."

If that email sounds too good to be true, that's because it rarely exists. But direct evidence does

sometimes exist in more subtle forms. There may be an email, or more frequently a verbal comment, along the lines of, “Aaron’s reporting really created a lot of hassle for us.” This sort of email or comment provides circumstantial rather than direct evidence, meaning there is no direct link between the reporting and the decision to terminate employment. But there is still evidence that the reporting was met with hostility and that a person (more specifically, a juror) could reasonably infer that hostility led to the wrongful termination.

Temporal Proximity

The most common piece of circumstantial evidence for a retaliatory motive, and the most useful type outside of statements directly related to the whistleblowing, is temporal proximity: the shorter the time period between the whistleblower reporting and termination, the more likely that there was a causal link between the two actions.

In a recent New York case, Yang v. Navigators Group, Inc., the court stated that “periods ranging from twelve days to one month” have been considered “very close” in time. When a plaintiff can point to this sort of “very close” temporal proximity, the court is more likely to find that proximity alone is sufficient to show a causal link between whistleblowing and retaliation. But when there is a significant period of time between reporting and termination, a court will require a plaintiff to provide evidence besides temporal proximity in order to show a causal link.

In addition, when there is a large time gap in this sort of situation, the more likely it is that an employer can find what courts refer to as a “legitimate intervening basis”—some non-retaliatory reason for the termination that happened after the employee reported wrongdoing. As I noted above, an employee can still win a retaliation claim if they show that the employer’s stated reason for termination was not the true reason, but instead was a pretext for retaliating against the employee. Proving a causal link and proving pretext require similar evidence; both essentially ask the employee to show that the reason for her termination—the real, underlying cause—was illegal retaliation.

Other Evidence of Retaliation at Work

Assuming an employee lacks direct evidence of retaliation, it is helpful for her to have as many different forms of circumstantial evidence as possible. In addition to temporal proximity, courts have looked to evidence such as a company failing to follow its own internal procedures when disciplining or terminating an employee, as the 6th Circuit Court of Appeals stated in a case last year (*Greene v. U.S. Department of Veterans Affairs*). For example, if company policy requires that employees receive some kind of warning before termination and an employer terminates someone who reported wrongdoing without any warning, that action could be evidence of retaliation.

Other evidence of retaliation could take the form of hostility from others that falls short of an adverse employment action, e.g., if an employee reports wrongdoing and her employer starts criticizing her performance to a greater degree after that report in a way that shows “increased scrutiny” of that employee. Such evidence, in conjunction with some degree of temporal proximity, can be enough to prove retaliation. In a 2009 case, *Hamilton v. General Electric Co.*, the 6th Circuit Court of Appeals ruled that a plaintiff established a causal link to show retaliation when he provided evidence of increased scrutiny by his employer and that he was terminated within three months of filing a charge with the Equal Employment Opportunity Commission (EEOC). Though the legal context of that case was a different sort of retaliation, courts generally use similar standards and look for the same evidence of causal link in any type of employment retaliation case.

Causal Link Takeaways

If you have reported wrongdoing and fear retaliation from your employer, it is important to gather evidence in the event that you are terminated or otherwise punished by your employer later on. If someone makes a strange or seemingly hostile comment to you about your reporting, either in conversation or in writing, note that down in writing at the time it happens so you can point back to that evidence later. If you feel like others, particularly a supervisor or other higher-up person at your job, start treating you differently after you report wrongdoing, keep a record of that as well. The more evidence (and types of evidence) that you have, the more likely it is that you will be able to prove a causal link between your whistleblowing and termination.