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# Litigating Employment Retaliation Claims: Strategies for Defending EEOC Charges and Retaliation Lawsuits

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# Litigating Employment Retaliation Claims

August 26, 2015

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PAUL HASTINGS

# Agenda

- Background and growth of whistleblower/retaliation litigation
- Recent developments in the law
  - Who is protected?
  - What is protected?
  - What is an adverse action?
  - What proof of causation is necessary?
  - Procedural issues
- Litigation strategies for defending retaliation claims
- Practical Considerations for Dealing with Whistleblowers

# Background: An already challenging paradigm

- Retaliation claims arise from:
  - Disagreement/dispute over compliance issue;
  - An adverse employment action; and
  - A perception that one caused the other.
- Person asserting the claim generally does not have to be legally correct about the compliance issue, just reasonable in his or her perception

# Background: The environment is ripe for claims

- Government increasingly relies on whistleblowers
- Broad statutory protection
  - Survey of Federal Whistleblower and Anti-retaliation Laws (April 22, 2013, Congressional Research Services http://www.fas.org/sgp/crs/misc/R43045.pdf)
  - More to come?
- Increasing publicity for significant economic incentives—"bounties"
  - Dodd-Frank whistleblower awards
  - False Claims Act cases
  - Increased scrutiny of confidentiality provisions in severance agreements by the EEOC and the SEC Office of the Whistleblower
- Among fastest growing category of claims
  - Retaliation claims were 43% of all EEOC charges in FY '14
  - SEC Office of Whistleblower received 3,640 tips in FY '14 (more than 20% increase over FY '13)

# Background: 2010 Dodd-Frank Act

- SEC "Whistleblower" bounty program and anti-retaliation protections
- Sarbanes-Oxley "kick out" provision and jury trial
- CFPB anti-retaliation protection
- Invalidated pre-dispute arbitration agreements for certain types of claims (SOX and CFPB)

# Background: Additional Provisions of the Dodd-Frank Act

- Dodd-Frank Section 1057, 12 U.S.C. § 5567:
  - creates a private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service;
  - Exhaustion required similar to Sarbanes-Oxley retaliation claims; and
  - Except for in some CBA's, predispute arbitration agreements covering such claims are invalid.

# Background: SEC Activity

- The SEC is getting aggressive in:
  - Going after companies it believes retaliated against whistleblowers who made reports to the SEC. See, e.g., 2014 SEC v. Paradigm enforcement action, resulting in a $2.2 million settlement.
  - Using compliance professionals tips to go after companies, and then paying the compliance professionals. This has occurred at least twice, the most recent being a more than $1 million bounty paid to a compliance professional tipster in April 2015.
  - Going after companies using allegedly overbroad confidentiality agreement that the SEC believes impede the purpose of its program, as in SEC v. KBR, in which KBR paid a $130,000 fine for using such an agreement in April 2015.

# Background: The employer's challenge

- Whistleblowers almost always are employees or former employees
  - Some are motivated by money, some by principle, and some have ulterior motives
  - All whistleblowers should be taken seriously, regardless of motivation
  - But employers should be cautious because retaliation cases are among most difficult to defend
- Personnel challenges abound
  - Performance management
  - Expectations management
  - Confidentiality
- Risk to be managed is two-fold
  - Understanding and, if necessary, mitigating the risk in the matter complained-of
  - Understanding and, if necessary, mitigating the risk of potential retaliation claims from the whistleblower

# Recent developments in the law

- Who is protected?
- What activity is protected?
- What is an adverse action?
- What proof of causation is sufficient?
- Procedural issues

# Case law developments: Who is protected?

- Sarbanes-Oxley:
  - *Lawson v. FMR,* 134 S. Ct. 1158, 188 L. Ed. 2d 158 (2014), and its progeny (SOX) (employees of contractors of public companies are protected by SOX anti-retaliation provision; how far does that go, to babysitters of public company CEOs?)
  - *Gibney v. Evolution Marketing Research, LLC,* 25 F. Supp. 3d 741 (E.D. Pa. 2014) (applying *Lawson;* "the specific shareholder fraud contemplated by SOX is that in which a public company – either acting on its own or acting through its contractors – makes material misrepresentations about its financial picture in order to deceive its shareholders")

# Case law developments: Who is protected?

- Dodd-Frank: Does the antiretaliation provision protect people who only complain internally and do not go to the SEC?
  - *Compare Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (5th Cir. 2013) (internal whistleblowers not protected) and *Berman V. Neo@Ogilvy LLC,* No. 14-cv-523, 2014 U.S. Dist. LEXIS 168840 (S.D.N.Y. Dec. 4, 2014) (same), *with*
  - *Somers v. Digital Realty Trust, Inc.,* No. C-14-5180, 2015 U.S. Dist. LEXIS 64178 (N.D. Cal. May 15, 2015) (internal whistleblowers protected), *and Rosenblum v Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. Oct. 25, 2013) (same)

# Case law developments: Who is protected?

- Extraterritorial application?
  - *Villanueva v. Core Labs.*, NV, No. 09-108, 2011 WL 7021145 (ARB Dec. 22, 2011): the ARB Holds that SOX section 806 has no extraterritorial application
  - *Meng-Lin v. Siemens AG*, 763 F.3d 175, 178 (2d Cir. 2014) (whistleblower protection in Dodd-Frank does not extend to a foreign national employed abroad by a foreign corporation when all events related to the employee's alleged protected activity and termination occurred outside the U.S.)

# Case law developments: Who is protected?

- Third party retaliation:
- *Thompson* – 2011 U.S. Supreme Court case green-lights these claims in certain situations.
- Post-*Thompson* Cases
    1. Dating Relationship
    2. Best Friend
    3. Spouses Employed At Two Different Employers
    4. *Thompson* Extends To The ADEA
    5. District Courts Split On Whether The FMLA Permits Third-Party Retaliation Claims

# Case law developments: What activity is protected?

- Sarbanes-Oxley: *Parexel* and its progeny since May 2011
  - The Pre-*Parexel* Landscape – SOX claimants almost never won
  - *Parexel* dramatically alters the landscape in May 2011 – *Sylvester v. Parexel Int'l LLC,* ARB Case No. 07–123, 2011 WL 2165854 (ARB May 25, 2011) (en banc)
  - Post-*Parexel* ARB Decisions – An Avalanche Of Favorable Decisions For SOX Complainants since *Parexel* was decided, including some really tricky and interesting ones like *Funke,* and another involving an in-house counsel in Houston (*Zinn I*)
  - Post-*Parexel* Federal Appellate Court Decisions That Follow *Parexel*
    - *Wiest v. Lynch*, 710 F.3d 121 (3rd Cir. 2013) – gives *Parexel Chevron* deference.
    - *Lockheed Martin v. ARB*, 717 F.3d 1121 (10th Cir. 2013) – gives *Parexel Chevron* deference.
    - *Nielsen v. Aecom Tech*., 762 F.3d 214 (2nd Cir. 2014) – gives *Parexel Skidmore* deference.
    - *Rhinehimer* v. US Bancorp*,* 787 F.3d 797 (6th Cir. 2015) – gives *Parexel Skidmore* deference.

# Case law developments: What activity is protected?

- SOX:
  - *Compare Nazif v. Computer Sciences Corporation*, No. 13-cv-5498, 2015 WL 3776892 (N.D. Cal. June 17, 2015) (granting summary judgment to defendant; no reasonable person would have considered the allegedly improperly booked revenue to be material and, therefore, shareholder fraud), *with*
  - *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015) (affirming jury verdict for plaintiff who complained of unsuitability fraud; adopting "the employee's reasonable belief *is a simple factual question requiring no subset of findings* that the employee had a justifiable belief as to each of the legally-defined elements of the suspected fraud.")

# Case law developments: What activity is protected?

- FLSA retaliation:
  - In *Kasten v. Saint–Gobain Performance Plastics Corp*., 131 S. Ct. 1325 (2011), the U.S. Supreme Court held that an employee's oral complaint could fall within the purview of the FLSA's anti-retaliation provision.
  - The Court did not say if the oral complaint had to be to the DOL, rather than to the employer, to be protected.
  - But, every circuit to rule on the question has held that an internal complaint to the employer can qualify as protected activity under the FLSA. *See, e.g*., *Greathouse v. JHS Sec., Inc.*, 784 F.3d 105 (2d Cir. 2015); *Minor v. Bostwick Laboratories, Inc*., 669 F.3d 428 (4th Cir. 2012).
  - The complaint must be sufficiently specific to alert a reasonable employer that a FLSA violation is being alleged.

# Case law developments: What activity is protected?

- Title VII Retaliation Claims
  - "Participation"
    - Majority rule: good faith not required
    - Minority rule: bad faith participation not protected
    - Must be connected to Title VII proceeding
  - "Opposition"
    - Opposition can take many forms
    - Must be done in good faith based upon reasonable belief

# Case law developments: What activity is protected?

- *Compare Boyer-Liberto v. Fontainebleau Corp.*, --- F.3d ---, 2015 WL 2116849 (4th Cir. 2015) (en banc) (reversing summary judgment for employer on retaliation claim; supervisor's use of the term "porch monkey" on two occasions), *with*
- *Yazdian v. ConMed Endoscopic Technologies, Inc.*, No. 14-3745, 2015 WL 4231698 (6th Cir. July 14, 2015) (affirming summary judgment on discrimination claim but reversing as to retaliation claim; supervisor forwarded article concerning ancient Persia and commented about Muslim dietary restrictions; employee terminated for insubordination)

# Case law developments: What is an "adverse action"?

- *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006)
- *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014) (applying *Burlington* standard under Title VII to SOX, holding that disclosure of SOX whistleblower identity to coworkers is adverse action)

# Case law developments: What is an "adverse action"?

- No adverse action found
  - *Kimble v. Donahoe*, 511 F. App'x 573, 575 (7th Cir. 2013) (rescinded suspension and letter of warning)
  - *Arnold v. Columbus*, 515 F. App'x 524, 531 (6th Cir. 2013) (internal investigation in response to false accusation against co-worker)
  - *Rester v. Stephens Media*, LLC, 739 F.3d 1127, 1131-32 (8th Cir. 2014) (supervisor screaming and cursing)
  - *Kuntz v. Tangherlini*, No. 2:14-cv-00152, 2015 WL 1565910 (W.D. Wash. Apr. 8, 2015) (failure to provide assistance in transitioning projects)

# Case law developments: What is an "adverse action"?

- Finding adverse action
  - *Lavalais v. Vill. Of Melrose Park*, 734 F.3d 629, 633-34 (7th Cir. 2013) (denial of lateral transfer request off of midnight shift)
  - *Thomas v. Cnty. Of Riverside*, 763 F.3d 1167, 1169, 1170 (9th Cir. 2014) (removal from paying teaching assignment, rescinding previously approved vacation)
  - *Rodiguez-Vives v. P.R. Firefighters Corps*, 743 F.3d 278, 284-85 (1st Cir. 2014) (denying firefighter opportunities to go out on calls, delegating cleaning and cooking tasks)
  - *Green v. Donahoe*, 760 F.3d 1135, 1146-47 (10th Cir. 2014 (placing an employee on unpaid leave and ultimately paying in full)

# What proof of causation is sufficient?

- Is there a requisite causal connection between the protected activity and the adverse employment action?
  - Title VII retaliation claims: 42 U.S.C. § 2000e-3 ("…because of…")
  - "AIR 21" standard (e.g. SOX claims): 49 U.S.C. § 42121(b) (contributing factor by preponderance of the evidence, same decision defense by clear and convincing evidence)
  - False Claims Act retaliation claims: 31 U.S.C. §3730(h) ("… because of…")

# Case law developments: What proof of causation is sufficient?

- *Fordham v. Fannie Mae*, ARB No. 12-061 (October 9, 2014) (holding that an ALJ should not consider employer's evidence of motive for the adverse action when assessing whether the complainant has met her burden; the proper time for consideration of that evidence is only after a determination has been made that the complainant's protected activity was a contributing factor in the decision)
- *Powers v. Union Pacific Railroad Company*, ARB No. 13-034 (March 20, 2015) (reaffirming and clarifying *Fordham*'s holding and explaining the obligation of ALJs to determine relevancy carefully and respect the different burdens for charging parties and respondents)(en banc)

# Case law developments: What proof of causation is sufficient?

- Do the *Nassar* and *Gross* But-For Causation Standard Render the *Staub v. Proctor Hospital* Cat's-Paw Theory Unavailable in Title VII or ADEA Retaliation cases?
  - *Goodsite v. Norfolk Southern Ry. Co.*, 2014 WL 4192786, *12, n.7 (6th Cir., August 25, 2014) ("it would appear that, at a minimum, the cat's paw theory of liability must be modified in Title VII retaliation cases.").
  - *Bishop v. Ohio Dep't of Rehab. & Corrs.*, 529 Fed. App'x 685, 699-700 (7th Cir. 2013) (McKeague, J., dissenting) (stating that *Nassar*'s holding requires Title VII plaintiffs to show that the supervisor's wrongful actions were the but-for cause of their termination).
  - *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-36 (11th Cir. 2013) ("Because the ADEA requires a 'but-for' link between the discriminatory animus and adverse action as opposed to showing that the animus was a 'motivating factor' . . . We hold that *Staub's* 'proximate causation' standard does not apply to cat's paw cases involving age discrimination.")

# Case law developments: What proof of causation is sufficient?

- The Fifth Circuit Has Raised the Question But Not Decided it.
  - *Holliday v. Commonwealth Brands, Inc.*, 483 Fed. App'x 917, 922 n.2 (5th Cir. 2012) (noting "it is entirely unclear whether our [prior ADEA cat's paw] decisions remain good law in the wake of *Gross* . . . and *Staub* . . ."; "it could very well be that our prior recognition of 'cat's paw' liability under the ADEA was incorrect).
- The Courts Are Not Fully in Agreement
  - *Daniels v. Pioneer Cent. School Dist.*, 2012 WL 1391922 (W.D.N.Y., April 20, 2012) (stating and citing numerous cases for proposition that there is no reason why the analysis in *Staub* cannot be reconciled with *Gross's* but-for causation standard).
  - *Murphy v. Center for Emergency Medicine of Western Pennsylvania, Inc.*, 944 F. Supp.2d 406, 431 n.75 (W.D. Pa. 2013) (applying cat's-paw doctrine in ADEA case, and rejecting *Sims* and *Holliday)*.

# Case law developments: What proof of causation is sufficient?

- The Sixth Circuit Has Articulated a Modified Test.
  - *Seoane-Vazquez v. Ohio State University,* 577 Fed. Appx. 418, 428 (6th Cir. 2014) ("we hold that cat's paw liability will lie in this [Title VII retaliation] case if: (1) nondecisionmakers took actions to deny Plaintiff tenure in retaliation for his protected conduct, and (2) those retaliatory actions were a but-for cause of Alutto's decision to deny tenure.").
  - In *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1070 (6th Cir. 2015),the Sixth Circuit upheld a jury verdict in a Title VII retaliation case that was premised on a "cat's paw"theory, even under this stricter, "but for" causation standard.

# Case law developments: Procedural issues

- Retaliation And The Exhaustion Requirement: A Conflict Is Brewing
  - *Gupta* and cases like it carve out an exception to exhaustion for retaliation that occurs after the filing of an EEOC charge.
  - There is an argument that the *Gupta* exception to exhaustion no longer applies after the Supreme Court's decision in *Morgan* in 2002.
  - The current landscape in the *Gupta v. Morgan* battle: A couple of courts – including the 10th Circuit and 8th Circuit – have found that the *Gupta* exception no longer applies. Most courts hold that it does. But, many courts have not addressed the issue yet, so stay tuned.
  - At some point, this will go to the Supreme Court.

# Strategies for defending retaliation claims: Themes

- Excessive time gap
- Intervening “nice things”
- Decision made before the protected activity
- “Plaintiff wasn’t dissuaded, so it wasn’t adverse”
- Decision “in the works” at the time of protected activity
- Similar treatment before and after the protected activity
- Good-faith belief in non-retaliatory reasons
- Plaintiff “doth protest too little”
- Plaintiff “doth protest too much”
- The “manager rule”
- Multiple non-retaliatory reasons
- No decision-maker knowledge of protected activity
- No decision-maker bias
- Multiple decision-makers

# Strategies: Excessive time gap

- *Conroy v. Vilsack*, 707 F.3d 1163, 1182-83 (10th Cir. 2013)
- *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 675-76 (6th Cir. 2013)
- *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998)
- *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012)

# Strategies: Intervening "nice things"

- *Musolf v. J.C. Penney Co.*, 773 F.3d 916, 919-20 (8th Cir. 2014)
- *Tyrrell v. Oaklawn Jockey Club*, 2012 WL 5397610, at *6 (W.D. Ark. 2012)
- *Fercello v. Ramsey Cnty.*, 612 F.3d 1069, 1083 (8th Cir. 2010)
- *Manatt v. Bank of Am.*, 339 F.3d 792, 802 (9th Cir. 2003)
- *Brady v. Houston Independent School Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997)
- *Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006)

# Strategies: Decision already made

- *Larmanger v. Kaiser Found. Health Plan of the Nw.*, 585 F. App'x 578, 578-79 (9th Cir. 2014)
- *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 738 (8th Cir. 2013)

# Strategies: "Plaintiff wasn't dissuaded, so it wasn't adverse!"

- In *Bush v. Regis Corp*., 257 Fed. Appx. 219, 222 (11th Cir. 2007) and *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437, 441-42 (5th Cir. 2007), the Courts of Appeals determined that the plaintiffs had not shown that the challenged allegedly retaliatory actions (written warnings) might dissuade a reasonable employee from filing a charge in part because the plaintiffs had not in fact been deterred from subsequently filing charges of discrimination.
- **But not all courts agree:** *See Turrentine v. United Parcel Service, Inc*., 645 F. Supp. 2d 976 (D. Kan. 2009) (stating such a rule "defies logic"); *see also Chowdhury v. Bair*, 604 F. Supp. 2d 90, 97 (D.D.C. 2009) (stating that the standard is whether a reasonable person would be dissuaded from engaging in protected activity, whether or not the plaintiff was).

# Strategies: Decision "in the works"

- *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 979 (8th Cir. 2012)
- *Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013)
- *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001)

# Strategies: Similar treatment before and after

- *Dalton v. ManorCare of W. Des Moines IA, LLC*, 782 F.3d 955, 962 (8th Cir. 2015)
- *Jajeh v. County of Cook*, 678 F.3d 560, 574 (7th Cir. 2012)
- *Bernard v. JP Morgan Chase Bank NA*, 408 F. App'x 465, 469 (2d Cir. 2011)
- *Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 354, 357 (2008)
- *Hutt v. AbbVie Prods. LLC*, 757 F.3d 687, 693 (7th Cir. 2014)

# Strategies: Good faith belief in nonretaliatory reasons

- *Rowe v. United Airlines, Inc.*, 2015 U.S. App. LEXIS 6194, at *11-14 (10th Cir. 2015)
- *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285-86 (6th Cir. 2012)
- *Handlon v. Rite Aid Servs. LLC*, 513 F. App'x 523, 528 (6th Cir. 2013)
- *Collins v. Am. Red Cross*, 715 F.3d 994, 997, 999 (7th Cir. 2013)
- *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 417 (8th Cir. 2010)

# Strategies: Plaintiff "doth protest too much"

- *Zielinski v. City of Wildwood*, 2014 WL 6991388, at *6 (D.N.J. 2014)
- *Benes v. A.B. Data, Ltd.*, 724 F.3d 752, 753-54 (7th Cir. 2013)
- *McGrory v. Applied Signal Tech. Inc.*, 212 Cal. App. 4th 1510, 1527 (2013)
- *Aldrich v. Rural Health Servs. Consortium, Inc.*, 579 F. App'x 335, 337-38 (6th Cir. 2014)
- *Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 756 (9th Cir. 1997)

# Strategies: Plaintiff "doth protest too little"

- *Satterwhite v. City of Houston*, 2015 U.S. App. LEXIS 3370, at *7 (5th Cir. 2015)
- *Lenzen v. Workers Comp. Reinsurance Ass'n*, 705 F.3d 816, 821 (8th Cir. 2013)
- *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 223, 225-27 (1st Cir. 2012)
- *Fox v. Eagle Distrib. Co.*, 510 F.3d 587, 592 (6th Cir. 2007)

# Strategies: The "manager rule"

- Many courts hold that HR and other managers must "step outside" their normal job duties to engage in protected oppositional activity under Title VII and other anti-retaliation laws. *See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008); *Brush v. Sears Holdings Corp.*, No. 11–10657, 2012 WL 987543 (11th Cir. Mar. 26, 2012).
- Recent decisions, however, indicate that the tide may be turning. *See Littlejohn v. City of New York*, No. 14–1395–cv, 2015 WL 4602450 (2d Cir. Aug. 5, 2015) (declining to extend manager rule to Title VII case); *DeMasters v. Carilion Clinic*, No. 13-2278, 2015 WL 4717873 (4th Cir. Aug. 10, 2015) (same); *Robinson v. Morgan–Stanley*, Case No. 07–070, 2010 WL 348303, at *8 (ARB Jan. 10, 2010) ("[Section 1514A] does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties."); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (rejecting employer's argument that the employee's SOX claim had to be dismissed because she never stepped outside her role).

# Strategies: Multiple non-retaliatory reasons

- *Curley v. City of North Las Vegas*, 772 F.3d 629, 632-34 (9th Cir. 2014)
- *Crawford v. City of Fairburn*, 482 F.3d 1305, 1308-09 (11th Cir. 2007)
- *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001)
- *Austen v. Weatherford Coll.*, 564 F. App'x 89, 92-93 (5th Cir. 2014)

# Strategies: No decision-maker knowledge

- *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 197 (3d Cir. 2015)
- *Hairston v. Vance-Cooks*, 773 F.3d 266, 275 (D.C. Cir. 2014)
- *McKinley v. Skyline Chili, Inc.*, 534 F. App'x 461, 463, 465-66 (6th Cir. 2013)
- *Smith v. Metro. Sec. Servs., Inc.*, 537 F. App'x 864, 867, 869 (11th Cir. 2013)
- *Halasa v. ITT Educ. Servs. Inc.*, 690 F.3d 844, 848 (7th Cir. 2012)

# Strategies: No decision-maker bias

- *Ameen v. Amphenol Printed Circuits, Inc.*, 777 F.3d 63, 71 (1st Cir. 2015)
- *Rattigan v. Holder*, 780 F.3d 413, 416 (D.C. Cir. 2015)
- *Stevens v. St. Elizabeth Med. Ctr., Inc.*, 533 F. App'x 624, 632 (6th Cir. 2013)
- *Smith v. Bray*, 681 F.3d 888, 906 (7th Cir. 2012)

# Strategies: Multiple decision-makers

- *Vasbinder v. Sec'y Dep't of Veterans Affairs*, 487 F. App'x 746, 750-51 (3d Cir. 2012)
- *Davis v. Unified Sch. Dist. 500*, 750 F.3d 1168, 1170 (10th Cir. 2014)

# Practical Considerations for Dealing with Whistleblowers

- Engaging outside counsel to conduct investigation
  - Pros
  - Cons
- Protect privilege and confidentiality
  - *Upjohn* warnings
  - Exchange Act Rule 21F-17 (SEC/KBR Settlement)
  - NLRB Rulings on employer confidentiality rules
- Don't forget the litigation hold
- Assess whistleblower's relationship to alleged wrongdoers
  - Impact on credibility of witnesses
  - Impact on possible interim reassignment of whistleblower
- Be mindful that this is your opportunity to write the story
  - Look for ways to make it less appealing to a plaintiff's lawyer

# Practical Considerations for Dealing with Whistleblowers

- Establish and Enforce a Policy Prohibiting Unlawful Retaliation
- Provide Training
- Do Not Ignore or Isolate Claimants
- Consider Additional Protective Measures
- Closely Review Subsequent Employment Actions

# Practical Considerations for Dealing with Whistleblowers

Considerations for disciplining an employee who has engaged in protected activity:

- Is the proposed action consistent with the employer's actual practice when presented with similar performance deficiencies or misconduct?
- Is the proposed action supported by appropriate documentation?
- Is the claimant now being criticized or disciplined for performance or conduct that the employer deemed acceptable or tolerated prior to the claim?
- Would an unbiased observer think the action was reasonable?
- Would the employer's "best employee" be treated the same way?

# Conclusion

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