

## RETALIATION UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act prohibits retaliation by employers against employees for asserting rights under the FLSA in violation of Section 15(a)(3) of the Act, which provides:

Prohibited acts; Prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of this Act [enacted June 25, 1938], it shall be unlawful for *any person* -

(3) to discharge or in any other manner discriminate against *any employee* because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act generally; for full classification, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Any adverse employment action is a violation of the above anti-retaliation provision if the proximate or motivating reason is the employee's exercise of his or her rights under the Act. These prohibitions were designed to permit employees to feel free to approach officials with grievances and to enhance compliance with the substantive provisions of the FLSA. Even if an employer's wage and hour policies do not violate the Act, it can be held liable for retaliation against an employee who merely believes the

employer's wage and hour policies violate the Act and complains. Where the immediate cause or motivating factor of a discharge is an employee's assertion of rights under the Act, the discharge is discriminatory whether or not other grounds for discharge exist.

**A. Who is covered by the Act?**

The anti-retaliation provisions apply, without qualification, to any employee, including former employees. 29 U.S.C.A. §215(a)(3); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6<sup>th</sup> Cir. 1977). In reversing the trial court, the *Dunlop* court noted that discrimination by former employers was precisely the sort of harm that Section 15(a)(3) was intended to correct. The employee is not required to be engaged in activities covered by the Act's minimum wage and overtime provisions. *Wirtz v. Ross Packaging Co.*, 367 F.2d 549, 550 (6<sup>th</sup> Cir. 1943). Under certain circumstances, even spouses of employees have received protection against retaliation. *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11<sup>th</sup> Cir. 1985).

Applicants for employment and independent contractors are not protected by the anti-retaliation provisions in Section 15(a)(3). *Harper v. San Luis Valley Regional Medical Center*, 848 F. Supp. 911 (D. Colo. 1994).

## **B. Who is liable for retaliation under the Act?**

The anti-retaliation prohibitions of Section 15(a)(3) are applicable to "any persons." The word "persons" has been broadly interpreted to include entities beyond the traditional corporate employer or business entities and its officers, including:

1. a plant manager and consultant actively engaged in plant operations (*Donovan v. Schoolhouse Four, Inc.*, 573 F.Supp. 185 (W.D.Va. 1983));
2. a labor union and its officers and members (*Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 3 WH Cases 253 (3<sup>rd</sup> Cir. 1943));
3. a government agency which does not rely on congressional appropriations for its budget (*Rivera v. Installation Club System*, 623 F. Supp. 269 (D.C.P.R. 1985)); and,
4. a county sheriff and county board of supervisors (*Barfield v. Madison County*, (4 WH Cases2d 426 (S.D.Miss. 1997)).

## **C. What activities are protected?**

Courts have broadly interpreted Section 15(a)(3) to protect activities beyond those expressly enumerated in the statutory language as protecting any employee who "has filed any complaint or instituted or caused to be instituted any proceeding under

or related to [the Act], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee", for example:

1. participating in a DOL audit or calling the DOL to ask if employees are entitled to wages for staff meetings;
2. circulating a petition to protest an overtime policy;
3. requesting a raise;
4. testifying at criminal proceedings under the Act; and,
5. communicating with investigators from the Wage and Hour division.

**D. Formal vs. informal notice.**

When an employee does nothing more than orally complain to the employer about wage policies, courts are split on whether the protections of Section 15(a)(3) apply. Decisions handed down over the last several years have done nothing to resolve this split among the circuits. The Second and Ninth Circuits have held that formal complaints to a government agency or court will satisfy the requirements of §215(a)(3) of the FLSA, while other courts have agreed that informal complaints to the employer will suffice.

In *Valerio v. Putnam Associates Inc.*, 5 WH Cases2d 389 (1st Cir. 1999), Putnam hired Valerio for a "Receptionist/Administrative Assistant" position, and told her that the job was considered exempt and that she would not be entitled to overtime pay. In a letter to Putnam, Valerio said that a receptionist is not an exempt employee under the

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FLSA and insisted she be reclassified as non-exempt and paid overtime. Several days later, Valerio was fired, allegedly because of a new modem system. The First Circuit sided with the Sixth, Eighth, Tenth, and Eleventh Circuits, which have determined that internal complaints to the employer will suffice, finding that Valerio's letter to Putnam was "sufficiently definite" to inform Putnam of her rights to overtime pay. The Court stated, however, that it must look at each case individually and held that not all written comments and criticisms made to an employer will be sufficient.

A district court in the Fifth Circuit sided with the majority of Circuits on this issue. In *Laird v. Chamber of Commerce*, 4 WH Cases2d 1629 (E.D. La. 1998), an employee who made an informal complaint to her employer by communicating that she had complained to the DOL was permitted to proceed with her FLSA retaliation claim although the employer alleged that it discharged her before she actually filed a complaint.

A recent case out of Virginia in the Fourth Circuit also held informal notice to the employer is not sufficient to trigger the anti-retaliation protections of the Act. The plaintiff/employee was fired after she complained that she was not being paid the required minimum wage. The court narrowly construed the anti-retaliation provision finding that the word "filed" in the provision clearly indicates that a "more verifiable activity is required than merely an oral complaint to a supervisor", and dismissed the plaintiff's claim. *Clevinger v. Motel Sleepers, Inc.*, 5 WH Cases2d 165 (W.D.Va. 1999).

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In a second case out of the Eastern District of Virginia, the plaintiff/restaurant manager told his employer that a co-worker was preparing to file an FLSA action against it. The plaintiff refused to comply with the employer's request to testify to a set of facts with which he disagreed and was fired. The anti-retaliation provision of the FLSA, 29 U.S.C.A. §215(a)(3) (1998) states that it is "unlawful for any person . . . to discharge . . . any employee because such employee . . . has testified or is about to testify." The court construed the provision narrowly, suggesting that the statute was clear in limiting the applicability to particular situations, and pointed to the retaliation section of Title VII which prohibits discriminating against employees who have "opposed . . . [any] unlawful employment practice." The court reasoned that this broad anti-retaliation provision shows that Congress could have written the FLSA anti-retaliation provision broadly, and determined that the plaintiff failed to state a claim upon which relief could be granted because he failed to show that he was "about" to testify or, more importantly, that any FLSA proceeding was ever initiated. *Ball v. Memphis Bar-B-Q Co.*, 5 WH Cases2d 184 (E.D. Va. 1999).

### **E. What conduct is prohibited?**

The majority of cases decided under the anti-retaliatory provisions involve retaliatory discharge - an employee is terminated for engaging in a protected activity. A claim of constructive discharge can be sustained if the employer makes the working conditions so intolerable that the employee is forced to involuntarily resign. The

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plaintiff's allegations she was being "set up", "games were being played", and she found certain employer actions to be rude, upsetting, or seemingly intrusive did not rise to the level of a materially adverse employment action as they had no impact on her wages, benefit levels, job title, or job responsibilities and privileges. Determining whether an action is materially adverse "must be cast in objective terms." *Campbell v. HSA Managed Care System, Inc.*, 4 WH Cases2d 365 (N.D.Ill. 1997).

An employer may not interfere with a former employee's ability to obtain and/or retain subsequent employment. The former employer can accomplish this purpose by disclosing to a prospective employer that the employee had filed a wage and hour complaint. Employers cannot be permitted to punish former employees by seeking to have them "black-listed" by potential employers.

An indemnity claim filed against an employee with the intent to retaliate is an unfair labor practice. Other actions which have been held to constitute unlawful retaliation against employees involve:

1. change in title from Senior Buyer to Buyer, suggesting a demotion (*Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543 (7<sup>th</sup> Cir. 1991));
2. reporting an allegedly illegal alien to the Immigration and Naturalization Service. In this case, the court said that the protection of the FLSA undoubtedly applies to undocumented aliens. If the courts permitted employers to circumvent labor laws by exploiting undocumented aliens,

then abusive exploitation would occur, and employers would have economic incentive to employ undocumented workers at an unfair rate (*Contreras v. Corinthian Vigor Ins.*, 4 WH Cases2d 1795 (N.D.Cal. 1998)).

Courts have applied both the "mixed-motives" and the "pretext" approach to proving claims of retaliation in violation of Section 15(a)(3) of the Act. Many of these cases do not fall neatly into either of the above categories but must instead be decided using a combination of the two approaches. Once all the evidence has been received, Justice O'Connor observed that the court can determine which method should be applied. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278, 49 FEP Cases 954 (1989).

**F. Affirmative defenses.**

The affirmative defenses which can be asserted in retaliation cases are:

1. statute of limitations;
2. the employee's state tort law claim arising from an alleged retaliatory discharge is preempted by the Act;
3. failure to mitigate damages; and,
4. in situations where the employee has tendered resignation, but the employer terminates him or her prior to the employees' intended last day of work (*Ayres v. 127 Restaurant Corp.* 12 F.Supp.2d 305 (S.D.N.Y. 1998)).

Other apparent affirmative defenses have been considered and rejected by the courts, i.e., an employer's good faith reliance on counsel and ignorance of the law.

### **G. Remedies**

Section 16(b) of the Act provides that employers who violate the anti-retaliation provisions of Section 15(a)(3) "shall be liable for such legal and equitable relief as may be appropriate to effectuate the purposes of section [15(a)(3)] of this title." 29 U.S.C.A. § 216(b). The following possible remedies are enumerated in Section 16(b):

1. employment;
2. reinstatement;
3. promotion;
4. lost wages and liquidated damages equal to the lost wages;
5. front pay;
6. compensatory damages (not generally available in other suits under the FLSA, have been awarded in a few cases, e.g. *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 111, 30 WH Cases 122 (7<sup>th</sup> Cir. 1990), *cert. denied*, 502 U.S. 812, 30 WH Cases 928 (1991));
7. reasonable attorney's fees shall be awarded;
8. pre-judgment interest; and,
9. entitlement to punitive damages is not a settled issue; the Seventh Circuit and courts in the Ninth Circuit have authorized punitive damages awards.

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In *Lambert v. Ackerley*, No. 963017v2 (9th Cir. June 10, 1999), the court awarded \$12 million in punitive damages to employees who reported that they were not being paid adequate overtime and were subsequently fired.

In *Shea v. Galaxie Lumber*, 152 F.3d 729 (7<sup>th</sup> Cir. 1998), the Court ruled that punitive damages could be awarded even if compensatory damages were not.

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10. Injunctive relief including reinstatement pending a trial on the merits and enjoining retaliatory lawsuits. One court held an employee was not entitled to injunctive relief because only the Secretary of Labor has the statutory authority to seek such relief under the FLSA. *Bjornson v. Daido Metal U.S.A., Inc.*, 12 F. Supp.2d 837 (N.D.Ill. 1998).

The remedies available to the Secretary in an action brought on behalf of an employee are generally equivalent to those available in a private action with the exception of liquidated, compensatory and punitive damages. Courts are more likely, however, to award pre-judgment interest in these cases. The rate of interest may vary by jurisdiction. Post-judgment interest has been awarded in a number of cases brought by the Secretary pursuant to Section 17 of the Act.