

RETALIATION IN HARASSMENT CASES and THREATS TO DETER REPORTING

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I'm with the State of California, and if I ever concluded that one of the higher-ups sexually harassed an employee, I'd be fired!, Statement of California state employee in front of 80 attendees at an EEOC TAPS Workshop on Investigating Sexual Harassment (Monterey 2000) conducted by this paper's author.

*Rape is unquestionably among the most severe forms of sexual harassment. Being raped by a business associate, while on the job, irrevocably alters the conditions of the victim's work environment. It imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex.*²

A weak command structure and a climate of fear among female personnel created the conditions that led to widespread instances of sexual assault of Air Force recruits by their instructors at Lackland Air Force Base in Texas, senior Air Force commanders said yesterday. New York Times, Jan 24, 2013, "Air Force Leaders Testify on Culture That Led to Sexual Assaults of Recruits"

With witnesses rare, sex-crime cases inevitably become "he said, she said" credibility contests, further stacking the deck against subordinate victims, since higher-ranking troops are considered inherently more credible. Rolling Stone, Feb 14, 2013: "The Rape of Petty Officer Blumer,"

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² *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 912 (9th Cir. 2001) (reversing summary judgment for defendant and holding that the defendant could potentially be liable for rape committed by third-party customer – the then Human Resources Director of Starbucks; Little was fired after she reported the rapes to her supervisors, her company's human resources coordinator and the company president)

Why, on the worst day of their life, don't they come forward? That's the heart of the problem. People don't feel comfortable coming forward, and they do not routinely report either sexual assault or sexual harassment, and that is one of the biggest problems we have. **Air Force General Mark Walsh**, testifying before House Armed Services Committee (*New York Times*, Jan 24, 2013, p. A15)

We want to set a new tone in the industry where women can come forward and complain without fear of retaliation. We want to stop the sexual harassment.

Mike Antle, Vice President, Tanimura & Antle, speaking at press conference announcing \$1.855 million settlement with EEOC (San Jose Federal Building, CA Feb 1999) in case where EEOC alleged that farm worker Blanca Alfaro was required to have sex (before each of two seasons) with the company hiring official so that she could pick crops in order to feed her 3-year-old daughter.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, national origin and religion.³ Title VII also prohibits retaliation against those who engage in protected activity including expressing opposition to discriminatory conduct or participating in related proceedings.⁴ In Fiscal Year 2012, much like FY 2011, retaliation charges represented 37.8% of all charges filed (nearly 100,000) – the highest percentage of any claim for that year, and the highest number of retaliation charges ever received by the EEOC in any fiscal year. **In FY2012, in California 44% of the charges received by the EEOC involve retaliation – the highest percentage of all states.**

Sexual harassment involving rape is the raw exercise of power – both real and perceived. Retaliation or threats to retaliate provide the control over the relationship. **And the imbalance of power and control creates the conditions for sexual predators to commit their acts. Retaliation is an indispensable weapon in the arsenal of a harasser. Perhaps of all settings, the workplace exhibits the greatest imbalance of power especially for non-English speaking women, immigrants, those who work the fields, and those who are geographically, socially, and linguistically isolated.**⁵ After all, the harasser supervisor can control whether the victim has a job, can feed her children, has a roof over her head and whether the members of her family can stay alive.⁶

³ 42 USC 2000e, et seq.

⁴ 42 USC 2000 e-3(a)

⁵ See, Rebecca Clarren, “The Green Motel”, *Ms. Magazine*, Summer 2005 (the “green motel” is what female farm workers describe the fields where women are forced to have sex with supervisors in order to get a job or keep a job); see also, William R. Tamayo, “The Role of the EEOC in Protecting the Civil Rights of Farm Workers”, 33 *U.C. Davis L. Rev.* 1075 (2000); see also, William R. Tamayo, “The EEOC and Immigrant Workers”, 44 *Univ. San Fran. L.R.* 253 (Fall 2009)

⁶ While most of EEOC's cases involving egregious sexual harassment involve low-wage, blue collar employees, the **Seattle area** case of *Little v. Windermere Relocation, Inc.*, 265 F. 3d 903 (9th Cir. 2001) illustrates that rape is not confined to those employees. Maureen Little was a Corporate Services Manager with Windermere Relocation Services in Washington state whose job was to develop business relationships in order to obtain corporate clients

Sexual harassment cases are consistently 25-30% of the EEOC's national litigation docket and 35% of the EEOC San Francisco District's docket. We're not just talking about inappropriate sexual comments or propositions for sex but actual rape, and sometimes repeated rape of farm workers and janitors in the fields, in the packing sheds, in the back room, or in isolated offices as higher management turns a blind eye. Perhaps most disturbingly is the young age of some of these victims. Some of them are 15 or 16 year old girls and boys being propositioned, fondled or raped by men 2 to 3 times their age. **What is clear is that as the disparity in power increases the conditions for egregious, violent sexual harassment to occur also increase.** Frightened and confused teenagers, workers with shaky immigration status, and the single mother desperate to feed her children are the easy prey for a harasser.

In nearly every sexual harassment case filed by the EEOC in court there is a companion retaliation claim. The power to retaliate is another major weapon in the hands of a perpetrator. Retaliation (threatened or actual) by the perpetrator or other company officials greatly magnifies the imbalance of power. *But retaliation also severely undercuts any anti-discrimination policies that a company may have or may believe it has. After all, if an employee is aware that the consequence for asserting one's rights under the policies is suspension, termination, further assault, etc., the policies are meaningless and the employer can no longer meaningfully rely on them as company policy.*

RETALIATION: WHO IS PROTECTED?

The United States Supreme Court over the last few years has reaffirmed the right of employees to complain about discrimination and to be free from retaliation. Employer conduct which would deter a reasonable employee from reporting discrimination or harassment or from pursuing a complaint is retaliation. *Burlington Northern Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006). The fact that an employee is retaliated against after she has complained about harassment or other discrimination indicates that a supervisor may not have been aware about the prohibition against retaliation and, more importantly, about the employee's right to complain about what she reasonably believes is harassment – whether she is right or not. This again speaks to the need for training for supervisors but also to the importance **of imposing discipline against supervisors or co-workers who retaliate.** Employers need to be aware that a finding of retaliation will often lead to a punitive damages award and that disciplining the retaliating party might serve to limit the award.⁷

needing relocations services for their employees. Until she was terminated after reporting to two Vice-Presidents and the President of the company that she believed she had been raped by the third party customer she had received only positive feedback from her supervisors and had the best transaction closure records of her peers by a large margin.

⁷ The recent Supreme Court decisions in *University of Texas Southwestern Medical Center v. Nassar* ___ U.S. ___, 2013 WL 315528 (June 24, 2013) No. 12-484 (Title VII retaliation claims must be provided according to traditional principles of but-for causation, not the lesser causation test of "motivating factor") and *Vance v. Ball State University* ___ U.S. ___, 2013 WL 3155228 (June 24, 2013) (to be a supervisor under Title VII the individual must have the authority to take tangible employment actions) do not per se restrict who is covered by Title VII's prohibition against retaliation.

Following the decision in *Burlington Northern*, the U.S. Supreme Court issued several decisions recognizing the broad protections of employees against retaliation. In *Crawford v. Metro. Gov't of Nashville & Davidson Cty* 555 U.S. 271 (2009) the court held that an employee's participation in an employer launched internal investigation of sexual harassment by the department's **Director of Employee Relations** constituted "protected activity" because she described acts of sexual activity that reflected her opposition to the harassment. The court declined to address the question of whether the employee (who alleged that she was fired in retaliation for cooperating in the investigation) participation in the internal investigation constituted "participation in a proceeding" for purposes of Title VII's anti-retaliation provision coverage.

In *Kasten v. Saint-Gobain Plastics Corp*, ___ U.S. ___, 131 S. Ct. 1325 (2011) the court held that for purposes of the FLSA's anti-retaliation provision, an **oral complaint** about the location of time clocks constituted "protected activity".

In *Thompson v. North American Stainless Co.*, ___ U.S. ___, 131 S. Ct. 863 (2011), the court unanimously held that the terminated **fiancé of an employee** who filed an EEOC charge fell within the zone of interests of "aggrieved persons" and that Thompson's relationship to the charging party was sufficient to meet the first prong of the retaliation scheme, i.e. engaged in protected activity. Thompson had not done anything to express opposition per se to the discrimination his fiancé objected to nor did he even help her in filing the EEOC charge.

RETALIATION: DON'T FIRE THE EMPLOYEE WHO REPORTS IT....BUT IS IT REALLY UNLAWFUL?

In *EEOC v. Fry's Electronics*, 2012 WL 2115299 (W.D. Wash. June 11, 2012), EEOC alleged that Supervisor Ka Lam had been fired after he reported to Fry's headquarters that an employee was being sexually harassed by the Assistant Store Manager. Fry's policy stated in part:

If you believe you, or a co-worker, has been harassed, please speak to and/or provide a written complaint to your Store / Asst. Store Manager as soon as possible after the incident. If you are not comfortable with this course of action, you should speak with and/or provide a written complaint to the Benefits Services Dept., Dept. District Manger, or your Department Director, as soon as possible after the incident. The complaint should include details of the incident, names of the individuals involved, and names of witnesses. An Associate Harassment Complaint Report form is available from the Store / Asst. Store Manager, or in the Forms Center at the Home Office, to aid you in writing your complaint.

Fry's does not allow any form of retaliation against any associate who has expressed their concerns, opinions and/or observations;

If [an employee who reports harassment or other concerns] is retaliated against by their Supervisor, Department Manager, or Director, or any other member of upper manager, the individual retaliating will be subject to severe disciplinary action, up to and including termination,” *Id.*, Ex. 1 at 42;

Fry's wants to repeat that it will not tolerate any retaliation against [employees] for expressing [their] ideas or concerns, and

Fry's will not retaliate against an associate for filing a good faith [harassment] complaint, and will not tolerate or permit retaliation by management, associates, or co-workers⁸

America Rios was a 19 year old employee who received sexually explicit texts from Assistant Store Manager Manasse Ibrahim in which he stated, *inter alia*, that he wanted to look at Rios' breasts, have drinks with her and hang out late at night. She reported this to her A/V department supervisor Ka Lam and showed him two of the numerous text messages. Rios also reported the texts to her A/V Department Manager, Mr. Le, who recommended that Rio report the harassment to the Store Manager Art Squires. Mr. Le did nothing further. When Lam informed Le that he was going to contact the Home Office in San Jose rather than go through Mr. Squires, Mr. Le advised that it was an option that Lam could pursue if he didn't want to talk to the Store Manager. Rios, Lam and Le were reluctant to report the harassment to Squires since Squires and Ibrahim were good friends.

In early May 2007, Lam called Fry's Home Office and spoke with Director of Risk Management, Lisa Souza who relayed the message to the Executive Vice President Kathy Kolder. Rios also called the “silent witness” hotline. When Kolder learned of the sexual harassment allegation, she directed Store Manager Squires to conduct an investigation, and informed Squires (when he was at the San Jose HQ) that Lam had forwarded the complaint. Upon return to Renton, Squires called Lam into his office and told him that someone had complained about sexual harassment. “Although Mr. Squires announced the he would be conducting an investigation of the complaint, he did not question Mr. Lam regarding his knowledge of events or Ms. Rios' situation. Rather, ***Mr. Squires admonished Mr. Lam to treat the assistant store manager (Ibrahim) with respect*** and made some rather pointed comments regarding Mr. Lam's job performance.”⁹ Lam testified in deposition that Squires said to him, “...you should worry about your performance. I'm not saying I'm going to fire you now, but you should only worry about your – you should worry about like your performance, and you should worry about your job and your job only.”¹⁰

During a meeting with Squires and Le, Rios still had the offending texts but Squires did not request it. On May 22, Rios contacted A/V District Manager Kevin Karst and asked if he was aware of her sexual harassment complaint. Two days later Lam was placed on a 5-day

⁸ *EEOC v. Fry's Electronics*, 2012 WL 2115299 (W.D. Wash. June 11, 2012)

⁹ *Id.* (emphasis added)

¹⁰ *Id.*

suspension and then terminated. The harassment of Rios continued and she was fired on February 14, 2008.

EEOC filed suit on behalf of Ka Lam and America Rios, and Ka Lam intervened into the lawsuit and Rios added her state claims. After lengthy litigation including sanctions against Fry's for destroying evidence (see below), the matter settled for \$2.3 million: \$1.6 million for Lam (includes attorneys fees) and \$700,000 (includes attorneys fees) for Rios in August 2012.

RETALIATION: IS AN HR OR LOSS PREVENTION MANAGER COVERED? IS A MANAGER WHO REPORTS HARASSMENT COVERED?

Some courts maintain that if a Human Resources staff member or a Manager reports an employee's claim of harassment to another level of management such reporting does not constitute "protected activity" under Title VII, and thus termination of the HR staff or manager cannot constitute retaliation.

In *Brush v. Sears Holdings Corp.*, 466 F. App'x 781 (11th Cir. 2012), cert. denied, 133 S. Ct. 981 (2013) Janet Brush was a Loss Prevention District Coach at Sears whose job was to minimize varieties of risk and protect assets, including employees. Around September 15, 2007, Brush received a call from employee "Mrs. Doe," who said she was being sexually harassed by her store coach. Brush notified Sears of the allegation, who suspended the store coach and directed Brush and another Sears employee to investigate further. They met with Mrs. Doe, but both felt that she was not forthcoming, so Brush met with her alone. Mrs. Doe told her she had been raped multiple times by the store coach, but she asked that neither her husband nor the police be informed of the rape. Brush subsequently reported it to Sears, urging Sears to call the police. Sears declined, citing the investigation's incomplete status and Mrs. Doe's own requests. Sears terminated the store coach who Mrs. Doe claimed raped her, but Brush continued to urge Sears to report the alleged rape. On November 20, 2007, Sears terminated Brush, citing her violation of Sears' policy relating to the investigation of sexual harassment claims by interviewing Mrs. Doe alone. Brush then filed suit against Sears, claiming that she was terminated "because of her participation in the investigation and her opposition to the way [Sears] was handling" Mrs. Doe's rape complaint."

The 11th Circuit Court of Appeals held Brush had not engaged in protected activity since she investigated and disputed Sears' actions in the course of performing her job. The court cited the "manager rule," which holds that an employee like Brush engages in protected activity only when she "crosses the line from being an employee 'performing her job' to an employee lodging personal complaint." Here, she was neither the aggrieved nor accused party in underlying allegations, rather she was one of employees tasked with conducting internal investigation, and thus she acted solely as "manager" during such investigation. The court also held that Brush's disagreement was not with sexual harassment but with Sears's internal investigation policy.

In *Dunn v. Wal-Mart Stores*, 2013 WL 1455326 (S.D. Fla. Apr. 9, 2013), Daisy Berrios joined Wal-Mart in 2000, and in 2009, she was selected by Claudine Elvin to be part of the management team at a new Miami Wal-Mart store. While there, she received two complaints about possible national origin and race discrimination. **Following Wal-Mart's labor and**

discrimination policies, she reported the complaints outside of the store hierarchy to the company's labor relations department. After she reported these complaints, Claudine Elvin called her into her office and admonished her for “going over [her] head” and allegedly threatened “to leave [Berrios] jobless with no bread on the table.” Berrios began to receive negative feedback about her job performance, and was ultimately terminated. She sued Wal-Mart for retaliation under Title VII's opposition clause.

In granting summary judgment to Walmart, the District Court noted that the “manager rule” still applied post-*Crawford*, and cited to *Brush*. Under the “manager rule,” Berrios had to show that her opposition went beyond the scope of her normal duties. Here, however, she received complaints she was supposed to receive and did not express any agreement with the complaints, but “simply relayed a message that she was required to relay.” The court explained that “under the definition of ‘oppose’ set out in *Crawford*, relaying a message that one is required to relay by her job responsibilities does not amount to a protected activity.”

THE “MANAGER” RULE IN THE NINTH CIRCUIT

The manager rule originated with *McKenzie v. Renberg's Inc.*, 94 F. 3d 1478 (10th Cir. 1996). *McKenzie* held that “merely performing [...] everyday duties as personnel director” does not constitute taking “some action adverse to the company,” which is “the hallmark of protected activity.” *Id.* at 1486. Thus, when a “manager” merely informs an employer about the risk or presence of unlawful discrimination, the manager fails to meet the prima facie element of protected activity for anti-retaliation provisions to apply, unless the manager goes “further and actually object[s] to the practice in question or disagree[s] with the employer's actions.” *See id.*

While the Ninth Circuit has yet to adopt or reject the manager rule, several district courts within the Circuit have cited to *McKenzie*'s holding and hewed to its scope and rationale in Title VII and FLSA retaliation cases. *See, eg. DeSpain v. Evergreen Int'l Aviation, Inc.*, 2013 WL 594895 (D. Or. Feb. 14, 2013)(noting there is no controlling case law for the manager rule). While *Brush* signals the continued viability of the manager rule post *Crawford*, it does not expand it to create a complete safe harbor for employers retaliating against managers. *See Brush v. Sears*, 466 F. App'x 781 (11th Cir. 2012), *cert denied* (emphasizing opposition must be to unlawful activity, while postulating that the manager's actions, reflecting strong personal opposition to sex discrimination, fell within her job duties), and *Crawford v. Metro*, 555 U.S. 271 (2009).

The district courts within the Ninth Circuit, however, have sketched a fact-intensive approach whereby a manager may be protected from retaliation for opposition to unlawful activity if she shows: 1) her actions were outside the scope of their job duties; and 2) her actions diverged from the employer's interest and reflected a personal reaction to and opposition of unlawful discrimination, with a limit at actions adverse enough to undermine her job functions; or 3.) she refused to accede to a specific unlawful practice in the assertion of someone else's rights. First, managers are not protected when they are only doing what any other employee in their position would have been obligated or expected to do in the company's interest. *See, eg. Clemons v. Nike, Inc.*, 2007 WL 2890972 (D.Or. Sept. 28, 2007) (manager not protected by

ADA when persistently asking for more time for the interactive process). Otherwise, “[n]early every activity in the normal course of the manager’s job would potentially be protected activity An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield . . .” *Stewart v. Masters Builders Ass'n of King & Snohomish Counties*, 736 F. Supp. 2d 1291 (W.D. Wash. 2010).

Second, the manager must have taken actions showing she is “personally opposed to the discrimination.” *DeSpain v. Evergreen Int'l Aviation, Inc.*, 2013 WL 594895 (D. Or. Feb. 14, 2013). For example, in *Evergreen*, the manager was general counsel to the defendant and she introduced a candidate for an open position. The defendant allegedly responded that the candidate was “great, BUT, he’s Hispanic.” *Id.* at *2. She asked him to reconsider, and she was told “what part of NO don’t you understand?” *Id.* Shortly after, the plaintiff told another company executive that the failure to hire or consider a Hispanic candidate “could be perceived as discriminatory and flat out wrong.” She was terminated the next day. *Id.* at *3. Based on these facts, the court found it was sufficiently unclear if she was acting as general counsel or as a hiring manager personally opposed to discrimination to deny the defense’s motion for summary judgment. *Id.*

However, it may be insufficient to repeatedly raise concerns about liability or employee complaints without details like those in *Evergreen*, demonstrating personal opposition beyond the company’s interest in avoiding liability. For example, in *Stewart v. Masters Builders Ass'n of King & Snohomish Counties*, 736 F. Supp. 2d 1291 (W.D. Wash. 2010), the manager had made several oral and written complaints about wages after employees had asked him to contact the state labor department to ascertain if they were entitled to overtime. The court found that his “vague assertion as to oral discussions . . . does not reveal sufficient detail to support a” conclusion he was no longer acting in the interests of the company. *Id.* at 1300. The court found his written complaints showed he was acting in the company’s interest, because he made statements such as, “In my role as director I have a responsibility to . . .” and “we may be operating outside the law,” and he hedged some of his concerns by saying he “may very well be wrong.” *Id.* at 1297.

A limitation to the requirement of personal opposition showing adverse interest is when the manager takes a position that is so adverse to the employer it effectively undermines their job function. *See, eg. Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075 (9th Cir. 1996)(holding an affirmative action officer is not engaging in protected opposition when fired for disobeying instructions, intimidating employees, and taking actions for which she had no authority), and *Smith v. Singer*, 650 F.2d 214 (9th Cir. 1981) (equal opportunity officer is not protected when he “puts himself in a position entirely adverse to his employer” by surreptitiously filing charges with the EEOC and thus “render[s] himself unable to fulfill the function” of encouraging voluntary affirmative action).

Third, refusing to accede to a specific unlawful practice in the assertion of someone else’s rights may also be protected adverse activity. For example, in *Muniz v. United Parcel Service*, 731 F.Supp.2d 961 (N.D.Cal.2010), the district court explained that, while reporting possible FLSA violations were not protected activity, “refus[ing] to accede to an alleged practice of masking wage-and-hour violations, which a jury could construe as a position adverse to

UPS . . . does not preclude” a retaliation claim under *McKenzie*. *Id.* at 970, *see also EEOC v. HBE Corp.*, 135 F. 3d 543 (8th Cir. 1998)(holding a manager was protected when, after being told to dismiss an employee, double checked the reason for dismissal, expressed a belief of racial animus, and refused to terminate), *cf. Meadows v. Kindercare Learning Ctrs, Inc.*, 2004 WL 2203299 (D.Or. Sept. 29, 2004)(holding as a matter of law that a general counsel who handled discrimination complaints could not maintain an action for opposing discriminatory policies, as opposed to discriminatory acts).

Brush’s Limited Persuasive Impact on the Manager Rule

In *Brush v. Sears*, 466 F. App'x 781 (11th Cir. 2012), *cert denied*, the 11th Circuit heavily emphasized the legal sufficiency of the employer’s actions, and noted the “plaintiff must have an objectively reasonable belief that the employer engaged in an unlawful employment practice,” which she could not have had. *Id.* at 785, 786–88. The court held that “since unlawful activity “is the *sina qua non* of “protected activity” as defined by Title VII, Brush cannot satisfy the first requirement of a prima facie case for retaliation.” *Id.* at 788. Significantly, the court also highlighted that the victim of sexual harassment was opposed to the plaintiff’s proposal to file a police report. *Id.*

Since *Brush* was clearly decided on the element of opposition to unlawful activity, its language on the scope of the manager rule is dicta. The manager rule was primarily raised to refute Brush’s argument that *Crawford* demonstrated an “investigative manager's role in reporting a Title VII violation necessarily qualifies as a “protected activity” relating to a discriminatory practice.” *Id.* at 786. Further supporting the inference that the 11th Circuit did not inflate the scope of “job duties” precluded from protection, it lists that in “her capacity as an investigator of Mrs. Doe's sexual harassment claim, Brush informed Sears of Mrs. Doe's allegations, investigated those allegations, and reported the results of her investigation to Sears.” *Id.* at 787. The court then stated, “Brush's job responsibilities involved exactly the type of actions that Brush took on Mrs. Doe's behalf.” *Id.* In its entire discussion of the manager rule, the court pointedly ignored all the other actions Brush had taken, and refused to include her vehement opposition to Sears’ refusal to do more for the victim as falling within the scope of her job duties. *See id.* at 786–87. This omission is significant, since, if the employer’s reaction had been legally deficient, then ardent advocacy for a stronger response would arguably meet the requirements of being beyond the scope of her job duties, adverse to the employer’s interest, and demonstrating personal opposition to sexual harassment.

In light of the emphasis of *Brush’s* analysis and Supreme Court case law demonstrating the broad and pragmatic scope of Title VII’s anti-retaliation provisions, *Brush’s* dicta on the manager rule may have limited persuasive effect and managers are not completely vulnerable to retaliatory employers. *See id.*; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011), *Crawford v. Metro*, 555 U.S. 271 (2009). It is noteworthy that none of the cases discussing the manager rule have addressed the chilling effect upon victims. Rather, the decisions are motivated by consideration of whether or not the manager is acting as a cog of the employer’s machine, or as an individual who is personally opposed to unlawful activity, finding the latter, with an aspect of clear personal disapproval, more worthy of protection. Thus, managers seeking protection in the 9th Circuit

from retaliation would do well to establish enough specific facts that demonstrate their personal reaction to and opposition of unlawful discrimination.

RETALIATION: REFUSAL TO COOPERATE DURING INTERNAL INVESTIGATION

In *McGrory v. Applied Signal Technology, Inc.*, 152 Cal. Rptr. 3d 154 (2013), John McGrory had been an at-will employee and a department manager for Applied Signal Technology, Inc. from July 6, 2005 until his termination on June 23, 2009. In late May 2009, a lesbian subordinate (Thomas) lodged a sexual harassment complaint against him, which prompted an internal investigation. The employer retained an investigator named Sejal Mistry who interviewed McGrory and many of his subordinates. In June 2009, Mistry reported that while McGrory had not discriminated against Thomas, he had violated the employer's policies on sexual harassment and business and personal ethics in many other ways, and he had been uncooperative and deceptive during the investigation. Other witnesses reported his numerous off-color sexual and racial jokes, and when Mistry had asked him how he ranked his subordinates and who had complained about Thomas, he had refused to answer, citing his concern for the privacy and confidentiality of coworkers. As a result of her report, the employer terminated McGrory, saying: (1) He violated the employer's policies on sexual harassment and business and personal ethics, (2) He was untruthful and uncooperative with the investigator, and (3) There was a concern that his behavior might create future legal liability for the employer.

McGrory sued, alleging his termination violated public policy. The trial court granted the employer's motion for summary judgment, stating that an employer need not have good cause to terminate an at-will employee, and the "reason for termination need not be wise or correct so long as it is not grounded on a prohibited bias." The court then found no prohibited bias in the reasons the employer gave. On appeal, McGrory argued that his participation in the investigation was Title VII protected activity.

The District Court of Appeal found that Title VII's protection from retaliation under the "participation clause" is limited to EEOC proceedings and not private internal investigations by employers, such as this one, and that theory applies for cases under the California Fair Employment and Housing Act.¹¹ Second, the court held that participation immunity does not prohibit an employer from imposing discipline for misbehavior during an internal investigation. Firing an employee for not cooperating is basically a business decision, and "this decision, as with most business decisions, is not for the courts to second-guess as a kind of super-personnel department." Third, the court also pointed out that refusing to participate in or cooperate with an investigation into a discrimination claim does not fall under Title VII's provisions that protect

¹¹ The EEOC does not concur in the position that "participation in proceedings" under Title VII's anti-retaliation "protected activity" requirement is limited to EEOC proceedings, state agency investigations or court proceedings. **The U.S. Supreme Court in *Crawford v. Metro Govt. of Nashville and County of Davidson, Tenn.* 555 U.S. 271 (2009) explicitly did not decide whether Crawford's participation in a company's internal investigation constituted participation in a "proceeding" under Title VII.** Instead it was sufficient for purposes of coverage that Crawford was expressing her opposition to sexual harassment by a manager when she describe the acts during the investigation.

opposition to illegal discrimination. Immunity for participation is limited to sincere participation *in opposition* of discrimination, which he did not do.

RETALIATION: NO HARASSMENT BUT RETALIATION CLAIM SURVIVES

In *Westendorf v. West Coast Contractors of Nevada, Inc.*, ___F.3d___, 2013 WL 1285975 (9th Cir. April 1, 2013) Westendorf was hired in February 28, 2008 as a project manager assistant under Dan Joslyn. Once, Joslyn referred to Westendorf's work as "girly work," but he quickly apologized and Westendorf never complained. However, the company president, Mario Ramirez, heard about it, and he told Westendorf that there had been previous problems with Joslyn and she should promptly report anything. In May, Patrick Ellis, who was also supervised by Joslyn, made several sexual comments to Westendorf regarding large breasts, tampons, and multiple orgasms. Westendorf complained after each incident and told Ellis to stop, and Joslyn was present when most of Ellis' statements were made, but he just chuckled or did nothing. Westendorf reported each incident to the company president, Ramirez, but Ellis's offensive behavior continued. In nearly each interaction, either by phone or in person, Ellis told her that she would have to clean the trailer while wearing a French maid's costume.

On July 14, Ramirez told Joslyn that Westendorf had complained about his failure to do anything about Ellis' sexual comments, and warned him that continued activity could result in termination. Soon after, Ramirez left for vacation, and Joslyn, rather than praising her work as he had done before, began criticizing it, belittling her, and cursing at her. When Ramirez returned on July 29, Joslyn reprimanded Westendorf for having told a subcontractor that company employees would not come to the subcontractor's social event because they would all be at Joslyn's daughter's wedding, and that he was "offended" at her for using his daughter's wedding as an excuse. Westendorf soon after explained the events to Ramirez, but before she could finish, Ramirez asked about the subcontractor's party invitation and she began explaining Joslyn's demeaning and picky behavior.

Finally, Mr. Ramirez said that she should do whatever Joslyn told her to do and "that he was tired of listening to all this and that obviously [she] had a problem getting along with [Mr. Joslyn] and that it would be best if [she] got [her] personal items and left." Ramirez and two employees then escorted Westendorf off the premises. Westendorf contended that she was fired, while Ramirez claimed that she quit, and she sued the company claiming that she was sexually harassed and that she was terminated in retaliation. The District Court granted summary judgment to the company.

On appeal, however, the Ninth Circuit while affirming that the harassment was not severe or pervasive enough to alter Westendorf's working conditions since she only had to see Ellis once a week for several months, reversed the lower court's summary judgment ruling on the retaliation claim. It found that a jury could reasonably find the Westendorf had been fired in retaliation for protected activity, and that the evidence showed she could and did reasonably believe she was being subjected to illegal sexual harassment, in which circumstance her complaints would be protected. Westendorf had to show that her protected conduct was a cause — but not necessarily the only cause — of her termination, and Ramirez's comment about being

“tired of listening to all this” supported that inference. Furthermore, even if the company argued it had a legitimate reason for firing her, there was enough evidence to support a finding of pretext for discrimination, since she had no record of insubordination before making sexual harassment complaints.

RETALIATION: SUSPENSION AND TERMINATION; DESTRUCTION OF RECORDS

In *EEOC v. Fry's Electronics*, --- F.R.D. ----, 2012 WL 2576283, (W.D.Wash., July 03, 2012) (defendant employer's late disclosures and improper objections led to striking of and \$100,000 were appropriate sanctions.) the EEOC alleged that Defendant subjected Charging Party America Rios to sexual harassment and also alleged Defendant terminated a supervisor, Ka Lam two weeks after he opposed and reported the harassment of Rios by another supervisor. The Court found that Fry's deliberately destroyed records of prior sexual harassment complaints about the Store Manager who investigated the harassment charge and who fired Lam and complaints about the supervisor who sexually harassed Rios and financial records that could show that Lam's department did not suffer losses which was one of the justifications given for his termination. The Court imposed a sanction of \$100,000 against Fry's for destroying documents and hard drives, and struck the company's affirmative defenses, and allowed the admission of documents related to other harassment allegations. After the imposition of the sanctions, Fry's agreed pay Lam and Rios \$2.3 million to settle the sexual harassment and retaliation claims in August 2012.¹²

RETALIATION: The Agricultural Industry¹³

I have a lot of fear that things will happen to me. I'm not the same any more. I don't have the same happiness as before. I don't want this to happen to my daughter or other women. It's just ruined my life completely. I haven't talked to a doctor because I don't have medical insurance. I have endure it alone. We are poor women, from the fields. We just want to have work and happiness, to give what you can, not to get a fortune. And they betray all that. And sometimes I can't stand it....I'm stumbling and stumbling.¹⁴

In sexual harassment and retaliation cases in the agricultural industry a pattern is emerging. The owners of the major farms tend to be white, English speaking longtime family

¹² For a description of the harassment see Order Denying Summary Judgment, *EEOC v. Fry's Electronics*, 2012 WL 2115299 (W.D. WA) discussed above.

¹³ See, “Rape in the Fields”, a PBS/Frontline documentary (June 25, 2013) and related information at <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>

¹⁴ Female farm worker's statement describing the impact of years of harassment. Tamayo, “The Role of the EEOC in Protecting the Civil Rights of Farm Workers”, 33 *U.C. Davis L. Rev.* 1075 at 1085 (2000)

members who turn over operations of the farm to “Jose”, a long time employee who is bilingual and who is expected to maintain the operations and keep labor problems to a minimum, i.e. “out of sight, out of mind.” The workers are geographically isolated from community services, have few options in life and are in desperate poverty. They are dependent on Jose to navigate the English-speaking world for them. If Jose is a predator and/or his supervisors below him are predators, it is the ideal situation for sexual harassment to occur – unfettered, unpunished, and unstopped. An effective human resource department is usually non-existent. In industries where flouting the law has been common, where legislative exemptions from labor and employment laws for is common – much like slavery – sexual assault of the workers can easily occur.

Unfortunately, some of the harassment cases that the EEOC has litigated involve rape (s) of the charging party (or class member) and/or the classic quid pro quo situation of a job opportunity contingent upon engaging in sex with the hiring official. The rapes involve the use of weapons (gun) or a sharp object (gardening shears to the throat) and immediate threats to kill the complainant’s husband, siblings and/or family members along with threats to terminate if the victim tells anyone of the violations. Retaliation in the form of physical violence has the strongest chilling effect.

In *EEOC v. Tanimura & Antle*, C99-20088 JW (N.D. Cal.) EEOC alleged that Blanca Alfaro, a single mother, and a class of women had been sexually harassed and specifically, that Alfaro had been forced to have sex with the hiring official on two separate occasions (once in Yuma, Arizona and another in Salinas, California) in order to be able to pick crops for each season and earn money to feed her three-year-old daughter. After she protested further harassment she was fired as was her co-worker who spoke up on her behalf. After a lengthy investigation and extensive negotiations, the EEOC announced a \$1.855 million settlement in February 1999, which sent shockwaves through a industry long neglected by the EEOC.¹⁵

In *EEOC v. Iowa AG, LLC dba DeCoster Farms*, No. 01-CV-3077 (N.D. Iowa), the EEOC alleged that a class of women had been sexually harassed and retaliated against at the poultry plants of DeCoster Farms. These women were repeatedly raped by co-workers and supervisors and had little recourse as they were **threatened with termination and deportation if they complained**. The EEOC promptly sent a team of investigators to Iowa. But the victims were scared to cooperate with the federal investigation since they had also been **threatened with physical harm, including more harassment, termination and deportation if they cooperated**. The EEOC quickly filed papers for a preliminary injunction to stop the retaliation so we could investigate. After months of investigation and litigation, the EEOC announced a \$1.525 million settlement in September 2002.¹⁶

In *EEOC v. Harris Farms*, No. F 02-6199 (AWI) (E.D. Cal.) the EEOC alleged that Olivia Tamayo had been raped in the fields at gunpoint by her **supervisor who threatened to kill her husband if she reported the rapes**. The rapes occurred in 1993, 1994 and 1995, and

¹⁵ See, Tamayo, “The Role of the EEOC in Protecting the Civil Rights of Farm Workers”, 33 *U.C. Davis L. Rev.* 1075 (2000)

¹⁶ Tamayo, “The EEOC and Immigrant Workers”, at 263

not until 1999 did she disclose the rapes to a sexual assault clinic and eventually to the EEOC.¹⁷ At the trial, the charging party's husband testified that the harasser waived a "silver-blue" gun in his presence several times. And, the husbands of other women who had been harassed also testified about the harasser waving the same silver-blue gun at them. Despite Olivia telling the company about the rapes, the company human resources officials waited for six weeks before notifying the sheriff. And to undermine the criminal investigation, the company's assistant manager of HR served to "translate" (although she was not fluent in Spanish) for the English-speaking deputy sheriff and opined that Olivia and the alleged harasser were having an affair. The deputy sheriff concluded that Olivia was not believable and the department stopped the investigation. More than five years after she reported the rapes to the company and the sheriff, a jury in Fresno, California unanimously found that Olivia had been sexually harassed and retaliated against and awarded her nearly \$1 million dollars.¹⁸

In *EEOC v. National Food Corporation*, No. 12-CV-00500-TOR (E.D. WA) EEOC alleged that a Latina farm worker had been forced to perform oral sex on her supervisor in a hen house at least once a week over a seven year period. Co-employees who reported harassment by the supervisor were fired. The case settled for \$650,000 (May 2013).

In *EEOC v. River Point Farms* CV-12-01765-SU (D. Ore.) EEOC alleged that a seasonal farm worker for River Point Farms faced relentless verbal abuse from her male supervisor from 2005 to 2010. In addition to unwanted sexual comments and requests for sexual favors, the supervisor constantly told the female employee that women are inferior to men and that she should submit to beatings by her husband, a co-worker employed at River Point. More than once, the EEOC said, the supervisor publicly encouraged the woman's husband to kill her. After her spouse attempted to kill her in September 2010, the supervisor blamed her for causing her husband's arrest and fired her. Although River Point later allowed her to return to work, the company nonetheless laid her off much sooner than others and did not rehire her for several months while others were hired in her stead, a retaliatory act for her complaints about the supervisor's abusive and discriminatory treatment. The case settled for \$150,000 (May 2013).

In *EEOC v. Wilcox Farms*, No. 08-CV-1141 (D. Or.) EEOC alleged that a Latina farm worker was subjected to ongoing sexual harassment including grabbing of her private parts, groping of her body, grabbing of breasts, etc. in the fields and retaliated against by being fired. The case settled for \$260,000.

In *EEOC v. Rivera Vineyards*, No. CV-01117-RT-SGL (E.D. Cal) EEOC alleged that a class of Latina farm workers were subjected to ongoing sexual harassment touching, groping, breast grabbing, leering and derogatory comments and that a worker was raped, and women were denied certain job opportunities. The case settled for \$1,050,000.

¹⁷See *EEOC v. Harris Farms*, 2005 WL 2071741 (E.D. Cal. 2005)(order denying renewed Motion for Judgment as a Matter of Law) See also, *EEOC v. Harris Farms*, 274 F. App'x 511 (9th Cir. 2008); *EEOC v. Harris Farms*, 2006 WL 1881236 (E.D. Cal. 2006) (order denying Defendant's Rule 62 (c) motion)

¹⁸ See Clarren; see also Tamayo, "The EEOC and Immigrant Workers", at 262.

RETALIATION: FOOD SERVICE, JANITORIAL AND WAREHOUSE INDUSTRIES

The disparity in power outlined above in the agricultural industry, is similarly played out in the service industry as the cases below illustrate.

In *EEOC v. Harman-Chiu, , Inc., dba KFC/Taco Bell*, No. 05-CV-3615 (N.D. Cal.), EEOC alleged that three Latinas employed at a Bay Area Kentucky Fried Chicken franchise had been sexually harassed and retaliated against. The case settled for \$350,000.

In *EEOC v. Sizzler USA Rest., Inc.*, No. 06-CV-6142 (N.D. Cal.), EEOC alleged that a kitchen employee was sexually harassed and threatened with violence (including thrusting of a knife by the cook directly at her on several occasions in front of a manager) if she complained about the harassment. The case settled for \$300,000.

In *EEOC v. ABM Industries, Inc. and ABM Janitorial Services, Inc.* No. 1:07 CV01428 LJO JLT, (E. D. Cal.), EEOC alleged that a class of Latina female janitors had been sexually harassed by their supervisors and co-workers and one was raped on the job. The vulnerability of these women was described as follows:

These women often worked late nights in office buildings and churches, never seen by anyone, but silently suffering from terrible working conditions. These women were vulnerable and isolated, yet found the courage to come forward to tell what happened to them. The women worked predominantly in and around central California, specifically in Fresno, Bakersfield and the Visalia region.

They were subjected to varying degrees of unwelcome touching, explicit sexual comments, and requests for sex. They also received invitations to hotels by 14 male co-workers and supervisors, one of whom is a registered sex offender.

Some of the male supervisors and co-workers exposed themselves to the women, and groped them in their vaginal area. They also grabbed breasts, and forced the women to touch an erect penis.

In one case, a woman was cleaning the bathroom, when a supervisor attempted to assault her by closing the door to the restroom, turning off the lights, and grabbing her legs and buttocks.

One of the most unfortunate aspects of this case involved a woman who was raped. Other women were subjected to attempted assaults and sexual battery.

Some of the claimants will tell you that when some of them were brave enough to complain, their hours were cut, and ultimately, they lost their jobs. **In other instances, the complaints fell on deaf ears, either because the supervisors or leads did not know how to handle them properly, or because they simply did not respond effectively.**¹⁹

¹⁹ Statement of Anna Park, EEOC Regional Attorney, Los Angeles District Office at September 2, 2010 press conference announcing settlement.

After intense negotiations, ABM agreed to pay \$5.8 million to 21 Latina janitors, most of whom were monolingual Spanish-speakers.

In *EEOC v. New Breed Logistics* 2:10-cv-02696-STA-tmp (W.D. Tenn.) EEOC alleged and the jury found that New Breed Logistics subjected three female employees in Memphis to sexual harassment and fired them in retaliation for complaining, and retaliated against a male employee by terminating him because he opposed the harassment and agreed to serve as a witness for several claimants during the company's investigation. A jury rendered a verdict of more than \$1.5 million. The verdict followed a seven-day trial before U.S. District Court Judge S. Thomas Anderson on behalf of four claimants and included awards of \$177,094 in back pay, \$486,000 in compensatory damages and \$850,000 in punitive damages for the discrimination victims.(May 2013)

RETALIATION: THREATS OF PHYSICLA HARM AND THE CONSEQUENT EQUITABLE TOLLING

In *EEOC v. Willamette Tree Wholesale, Inc.*, CV 09-690-PK (D. Ore.) EEOC alleged that a farm worker, soon after her hire was forced upon flattened card board boxes and raped with shears to her throat by her supervisor. The supervisor threatened to fire and kill her two siblings and brother-in-law (all co-employees) and her relatives in Mexico if she ever reported the rapes to anyone. Following the first rape, the farm worker was forced to perform sex on the supervisor several times in the fields during the winter months in Oregon. After she refused to perform sex in the fields in part because of the pain that she suffered, the supervisor fired her. Traumatized by the rapes and threats to kill her family, the charging party did not file a charge with the EEOC until 62 days past the 300 day deadline to file a charge. The company moved for summary judgment *inter alia* on timeliness grounds. The EEOC opposed the motion and argued that the facts of the case warranted “equitable tolling” of the filing deadline. In denying summary judgment and granting “equitable tolling”, the court noted that “the *Stoll* court found equitable tolling applicable when a plaintiff was sexually harassed and repeatedly raped by supervisors in the workplace, and the experience left her “so broken and damaged” that she was unable to protect her rights”.²⁰ The court held that “An applicable limitations period may be equitably tolled ‘when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff’s control made it impossible to file a claim on time.’ *Stoll v. Runyon*, 165 F.3d 1238, 1242 99th Cir. 1999), citing *Alvarez-Machain v. United States*, 107 F.3d 696 600 (9th Cir. 1997).”²¹ In finding equitable tolling warranted under *Stoll*, the court noted,

Moreover, Willamette Tree does not dispute (psychologist) Dr. Wallis’ testimony or (therapist) Ms. Tredinick’s testimony regarding the psychological effects of the repeated workplace rapes suffered, including severe depression, post-traumatic stress, suicidal ideation, social isolation and panic attacks, all exacerbated by any reminder of the sexual assaults, including being called upon to report or describe

²⁰ *EEOC v. Willamette Tree Wholesale* 2011 WL 886402 (D. Or. March 14, 2010)

²¹ *Id.*

her experiences. Considered together *with the evidence of Rodriguez' repeated threats to harm (the victim) and her family* should she disclose the sexual assaults to anyone, as well as the undisputed evidence that (the victim) was at all material times a monolingual, illiterate Spanish speaker unrepresented by legal counsel, plaintiff's evidence of psychological damaged suffered by (the charging party) in consequence of the sexual assaults she suffered in the Willamette Tree workplace is sufficient to establish the elements of equitable tolling under *Stoll*.

Willamette Tree, id. (emphasis added)

The court had also issued a protective order barring the defendant's discovery into the charging party's immigration status, her prior sexual history and her reasons for not reporting the rapes to the police.²²

RETALIATORY INVESTIGATION

In *EEOC v. Video Only*, CV-06-1362-KI, (D. Or.) EEOC alleged that an African-American employee and a Latino employee in a Portland store of a Seattle-based company were subjected to racial and national origin harassment and religious harassment. The attorney for the employees sent a letter to the company stating that an African-American employee and a Hispanic employee were being harassed by managers and co-workers on a constant basis. Within a week the owner instructed the general manager to engage a private investigator who had done some theft investigations for the company. The investigator spoke to the mother of the African-American employee's fiancée to ask if he had ever beaten her. Co-workers told the African-American employee that the investigator went to their workplaces to ask if the employee had sued anyone for race discrimination. A former manager and family members told the Hispanic employee that a private investigator was asking "disturbing questions" about him, and furthermore the investigator ran criminal background checks on the complaining employees. The court had no problem finding that the hiring of the private investigator to make these inquiries was unlawful retaliation and was intended to chill out the charging parties. *EEOC v. Video Only*, 2008 WL 2433841 (D. Ore.), 91 Empl. Prac. Dec. ¶ 43,232. The case eventually settled for \$500,000 for the two charging parties, and \$130,000 for two co-workers who were retaliated against for offering supporting testimony.

The conduct of the investigator after a complaint has been made will also be scrutinized by plaintiff's counsel. Any acts by the investigator that hint of retaliation will also defeat the affirmative defense. These acts might include *inter alia* statements like, "if you withdraw your charge we can all go home" or "I'm not here to help you but to protect the company" or "Joe is a family man and needs his job. Are you sure you want to pursue this?" Any hint of retaliation will also raise the question of whether the investigator is truly unbiased. (See discussion of *EEOC v. Lockheed Martin*, 05-00479 DAE-LEK (D.Hawaii) below.)

²² *EEOC v. Willamette Tree Wholesale*, No. 3:09-CV-00690-PK (E.D. WA), ECF No. 65.

RETALIATION: BY TOP HR OFFICIAL; WHEN PUNITIVE DAMAGES WARRANTED

Although not a sexual harassment case, in *EEOC v. Lockheed Martin*, 05-00479 DAE-LEK (D.Hawaii) the EEOC alleged that the Charging Party, an experienced African-American avionic electronic technician and Air Force and Gulf War veteran, was subjected to ongoing racial harassment including threats of bodily harm (choking, hanging, burying) and was fired in retaliation by the largest military government contractor. After receiving the written complaints of the charging party and a white co-worker who befriended him (which the first supervisor shared with the harassers), the HR investigator told the charging party that she “wasn’t here to help the charging party but to protect the company”. (Much of the harassment occurred on **Whidbey Island, just outside Seattle** in Puget Sound and at the airbase in Kaneohe, Oahu, Hawaii.) The poorly trained investigator stated that when she heard that the harassers called the charging party vile, racial slurs on a daily basis and made threats of lynching (*comments that they did not deny making*) she concluded that this wasn’t harassment but merely “guys being guys”. She also testified that in determining whether harassment exists, the investigator must focus on the intent of the alleged harasser.

In *Lockheed Martin* the charging party traveled from Hawaii to Greenville, South Carolina to speak with the head of HR at corporate headquarters. Charging party asked that he not be assigned to work with the same crew that had been racially harassing him and threatening his safety in Hawaii and in Washington state. He was told that if he did not take the assignment, he would be laid off. Thereupon, charging party informed the top HR official that he had just filed a charge with the EEOC Honolulu Local Office. The HR official then stated, “You did what? What did you do that for? We have 130,000 employees. I could have found you a job. You see those file cabinets? They’re full of cases filed by employees with the EEOC. We’re Lockheed-Martin. We never lose.” The lay off and the official’s statements were clearly intended to “chill the charging party” and constituted retaliation. Just weeks before trial, Lockheed attempted and lost its effort to change venue²³ from Honolulu to South Carolina and the case settled for \$2,500,000, the termination of the supervisor harasser and a permanent bar to the rehire of the remaining harassers.²⁴

Thus, the steps taken by a company even before the formal investigation begins and during the investigation are critical. They can doom an investigation, buttress a charge of retaliation and defeat an affirmative defense. Additionally, such actions may also support a claim for punitive damages. See *EEOC v. Harris Farms*, 2005 WL 2071741 (E.D. Cal.) (punitive damage jury award upheld where employee had complained about sexual harassment (including rapes by her supervisor) and retaliation during the investigation and while the EEOC charge was pending.

²³ *EEOC v. Lockheed Martin*, 2007 WL 2746800 (D. Hawaii, Sept. 17, 2007)

²⁴ See Tamayo, “The EEOC and Immigrant Workers” at 260-261.

RETALIATION: THREATS TO DEPORT; IMMIGRATION STATUS INQUIRIES

While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.

Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004).

In *EEOC v. Queen's Medical Center*, CV 01-00389 SOM-LEK (D. Hawaii), EEOC alleged that Dr. Premaratne, a native of Sri Lanka and medical researcher at Queen's Medical Center in Honolulu, complained to management that he was being denied opportunities that non-Sri Lankan doctors were provided. Soon after he complained, the hospital's assistant general counsel wrote a letter to the Immigration and Naturalization Service alleging that Dr. Premaratne inadvertently and inappropriately obtained his "green card" through the hospital (four years after Dr. Premaratne had been hired) because the hospital official who wrote the sponsorship letters lacked the authority to do so. Dr. Premaratne lost his job and INS initiated deportation proceedings. The immigration court found Dr. Premaratne to be eligible for permanent residency and granted him residency. (Dr. Premaratne thus lost 4 of the 5 years of permanent residency required to U.S. citizenship and had to start all over again to accrue 5 years of residency.) The EEOC filed suit alleging that Queen's retaliated against Dr. Premaratne when it took steps to have the doctor deported after he complained about national origin discrimination. (Dr. Premaratne filed state claims against the hospital and the University of Hawaii Medical School (which had a research arrangement with Queen's) alleging *inter alia* national origin and retaliation. The U.S. District Court in denying defendant's motion for summary judgment pointed out that Queen's assistant general counsel never contested the authority of the hospital official in question to write sponsorship letters of three other doctors who were still working. Consent Decree: \$150,000 for Title VII retaliation; undisclosed amounts for state claims. (2000)

In *EEOC v. Holiday Inn Express* (D. Minn.) (2000), EEOC alleged that the hotel discriminated against Mexican employees on the basis of national origin in various terms and conditions of employment and retaliated against them by reporting the workers to the INS after they complained. The workers had also engaged in protected activity under the NLRA. The case settled through a consent decree covering injunctive relief for wage increases, breaks and work standards without regard to national origin; provision of an interpreter so that non-English speaking employees are informed of company policies and \$72,000 in damages. The INS agreed to let the workers remain in the U.S. for two years while they arranged to gain legal status.

In *EEOC v. Quality Art LLC and Palestra Capital* (D. Ariz.) (2000). EEOC alleged that the company subjected a class of Hispanic females to widespread sexual harassment and national origin discrimination and retaliated against them by firing them or forcing them to resign, as well as by reporting undocumented workers to the INS. The matter resolved in a \$3.5 million consent judgment.

In litigation discovery where the EEOC has filed the lawsuit, it will seek a protective order if necessary barring defendant's inquiry into immigration status, and in trial will file limine motions to also prohibit such inquiry.²⁵

Immigration Status Inquiry Before Class Certification

Sometimes inquiries outside of the formal discovery process warrant a protective order. In a recent case, a company defendant hired a private investigator to ask potential class members about their immigration status before class certification was granted. Plaintiffs moved for protective order. *Saucedo v. NW Management and Realty Services*, 2013 WL 163425 (E.D. Wash., Jan. 15, 2013) The court found that evidence that certain putative class members were undocumented would have no bearing on whether the propose class satisfies the numerosity, commonality, typicality and adequacy of representation criteria set for in Rule 23 (a) and therefore a protective order was warranted. In granting the order the court noted, "...Farmland's proposal to question putative class members about their immigration status – particularly at this early stage of the proceedings – is inherently coercive. (citing *Rivera*). Indeed, there can be little doubt that using a private investigator to track down and interview putative class members in their private residences about their immigration status is likely to cause intimidation..." id.

²⁵ See, e.g. *Cazorla v. Koch Foods of Mississippi* (consolidated with *EEOC v. Koch Foods of Mississippi*), ___F.R.D.___, 2012 WL 6161959 (S.D. Miss. Nov. 30 2012) (protective order barring disclosure of immigration information, personal identifying information, tax documents and income information, and employment history); *EEOC v. Fair Oaks Dairy Farms*, 2012 WL 3138108 (N.D. Ind., Aug. 1, 2012) (protective order issued barring defendant's request for plaintiff charging party's visa, passport, and birth certificate alleged to be used for a "background check"). ; *EEOC v. First Wireless*, 255 F.R.D. 404 (E.D.N.Y. 2004); *EEOC v. The Rest. Comp., dba Perkins Rest. & Bakery*, 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006); *EEOC v. Bice of Chicago*, 229 F.R.D. 581 (N.D. Ill. 2005). *EEOC v. Willamette Tree*, 2010 U.S. Dist. LEXIS 97380 (July 8, 2010) (CV-09-690-PK) (D. Ore.) (protective order barred inquiry into immigration status, prior sexual history and reasons for not reporting rapes by supervisor to the police);