

Management Alert



Texas Bill Would Relax Causation Standard For Employment Retaliation Claims

Overview

Recently proposed legislation would make it easier for employees to win employment retaliation lawsuits under the Texas discrimination statute. Representative Nicole Collier (D) proposed the legislation on March 8, 2013 that would eliminate the “but for” causation standard in employment retaliation claims brought under Chapter 21 of the Texas Labor Code. If enacted, H.B. 3817 would change the nature of employment retaliation claims in two important ways:

1. Plaintiffs would be required to show only that retaliation was a motivating factor for the employment decision; and
2. Employers would be permitted to avoid damages, but not attorneys’ fees, if they can show they would have taken the same action regardless of the impermissible motivating factor.

Why Is The Causation Standard Change Important?

The proposed legislation would help plaintiffs establish employment retaliation claims under Texas law. Plaintiffs would still have to show that: (1) they engaged in a protected activity (e.g., made a complaint); and (2) an adverse employment action occurred (e.g., they were terminated). But the causation element would be relaxed. Currently, Texas precedent requires plaintiffs claiming employment retaliation to demonstrate they would not have suffered an adverse employment action but for their exercise of a protected activity. See *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 295 (Tex. 2000). This “but for” standard is a hurdle that prevents many plaintiffs from establishing employment retaliation claims.

But if a “motivating factor” standard applies, then employees would likely file more employment retaliation cases under the Texas Labor Code for two reasons:

- Plaintiffs Would Establish Liability More Often. Plaintiffs may have little trouble proving their complaints caused their employers to have negative feelings towards them. Even the best-intentioned employers cannot guarantee that none of their employees will react negatively to employees who make such complaints. As a result, employment retaliation claims with a “motivating factor” standard would be more dangerous and expensive for employers to resolve.
- Texas Law May Become More Favorable For Plaintiffs Than Federal Law: The federal courts of appeals are divided 3-2 on whether the “but for” or “motivating factor” standard applies to retaliation claims brought under federal employment statutes such as Title VII. The Fifth Circuit currently applies the “motivating factor” standard to such claims. But on April 24, 2013, the Supreme Court heard oral arguments in *University of Texas Southwestern Medical Center v. Nassar*—a case that will determine which standard applies in federal employment retaliation cases. If the Supreme Court adopts the “but for” standard, plaintiffs would be more likely to file their employment retaliation claims under the Texas Labor Code if H.B. 3817 is enacted.

Shouldn't Employers Be Happy If They Only Have To Pay Plaintiffs' Attorneys' Fees?

Not necessarily. Currently, a plaintiff must meet the "but for" causation standard in order to recover damages and attorneys' fees. Under the proposed bill, the burden of proof to negate "but for" causation would essentially shift to the employer after the plaintiff shows retaliation was a motivating factor in the employer's decision. Even if the employer could show that it still would have taken the same adverse employment action regardless of the impermissible motivating factor (e.g., effectively showing that a legitimate and permissible reason was the true cause of the decision), the employer would still be required to pay the plaintiff's attorneys' fees and costs. Thus, like the lessening of the causation standard, the increased availability of attorneys' fees could have two probable results:

- Plaintiffs' Attorneys Would Recover Attorneys' Fees More Often. H.B. 3817 would allow plaintiffs to recover attorneys' fees if they can meet the lenient "motivating factor" standard, regardless of the real reason for the employer's decision. Therefore, more plaintiffs' attorneys will be willing to take cases they might otherwise turn away.
- Texas Law May Become More Favorable For Plaintiffs Than Federal Law: Federal courts in the Fifth Circuit currently use the "motivating factor" standard when analyzing employment retaliation claims under Title VII. But unlike H.B. 3817, the Fifth Circuit does not allow for recovery of attorneys' fees and costs when the employer shows it would have taken the same adverse employment action regardless of the impermissible motivating factor. On April 3, 2013, the Fifth Circuit reaffirmed this result in *Carter v. Luminant Power Servs. Co.* Therefore, if enacted, H.B. 3817 would create a statutory scheme that is more favorable to plaintiffs than federal law in the Fifth Circuit.

H.B. 3817 was referred to the Business & Industry Committee on March 25, 2013. If enacted, it will take effect on September 1, 2013. We will continue to monitor this legislative activity.

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