FOCUS: LITIGATION

Fighting Back: Sometimes It's a Bad Idea

Paul F. Millus

The Random House dictionary defines retaliation as "to requite or make return for (a wrong or injury) with the like." One who is wrongfully accused in court—or in life—often feels the desire to fight back—ergo to retaliate. Retaliation can take many forms; some are lawful, and some are not. When accused in a legal proceeding, the accused may simply defend against the accusations while also stating, directly or through one's lawyer, that he or she intends to "vigorously defend against the claims asserted." But what if the defendant goes too far? What if the almost insatiable need to assert one's "rights" to be free from false accusations exposes the accused to more than he or she bargained for or expected.

This scenario can play out in a variety of ways. A client could be accused of an offensive act, and rather than simply have that client's denials in court speak for themself, the client may go further with his or her own legal threat to seek vindication outside of the court proceeding by engaging in acts to retaliate above and beyond the legal denials. This is when the client needs to take a breath, assess the possibility of the consequences associated with such "vindication," and proceed cautiously.

Take, for example, a person accused of something truly terrible, i.e., sexual assault. Rather than letting the denials contained into a pleading, and those asserted by the lawyer engaged to defend the accusations, the client lashes out on his own. Right before us is a recent highly publicized example in the case of *E.J. Carroll v. Trump*, 22-cv-10016 (Carroll II). In that case, after being on the receiving end of a $5,000,000 defamation verdict, Mr. Trump was faced with yet another defamation claim by Ms. Carroll, Mr. Trump spoke out, with vigor, regarding the nature of his views concerning the claim itself, his very personal views on Ms. Carroll (and her motivations) as well as other commentary concerning the outcome of Ms. Carroll's first defamation action. In other words, he retaliated.

As for the law as it applies to the retaliation engaged in by Mr. Trump, under New York common law, the "litigant's privilege" shields "one who publishes libelous statements in a pleading or in open court for the purpose of protecting the litigants' zeal in furthering their causes."[1] Such statements are absolutely privileged, provided that they are considered to be "material and pertain to the litigation."[2] Outside of court, however, the absolute privilege disappears, such that, the speaker may only potentially be protected by the "fair report privilege" under Section 74 of the New York Civil Rights Law that states that a civil action cannot be maintained against one who publishes a "fair and true report of any judicial proceeding."[3] The standard to determine "whether a report qualifies for the fair report privilege is whether 'the ordinary viewer or reader' can 'determine from the publication itself that the publication is reporting on [a judicial] proceeding.'"[4]

Mr. Trump's problem was that his statements were deemed not to be "a fair report of judicial proceedings" as a matter of law by U.S. District Judge Kaplan in denying Mr. Trump summary judgment. Therefore, no immunity was available, leaving only the truth or falsity of his (and the plaintiff's) statements to be decided and we are all aware how that turned out.[5]

So, what you do in response to a claim you (or your client) find frivolous or scurrilous, or even an outright lie, can be consequential. This leaves us to a discussion of retaliation in the workplace and where one may attack a claim that an individual (or entity) had violated someone else's civil rights.

In 2023, the New York State Court of Appeals, inundated with potential cases for final appellate review, eventually issued 57 decisions, 22 of which dealt with criminal cases, and one case addressed a retaliation claim brought by a plaintiff who had initially asserted a civil rights complaint against a party that was not particularly valid.[6]

On February 15, 2024, the court decided in the *Matter of Clifton Park Apartments, LLC v.* New York *State Division of Human Rights*,[7] holding that the threat of litigation may support a retaliation claim. Accordingly, the court held that the New York State Division of Human Rights ("DHR") "rationally concluded" that the element of a retaliation claim had been established and remitted the case so that DHR could address whether the respondent, CityVision Services, Inc. ("CityVision"), had engaged in protected activity.

The Facts

Briefly, CityVision is a Texas-based, not-for-profit tester organization. In such cases, the tester seeks to determine whether or not the property owners are engaging in discrimination by posing as a prospective tenant. One of their testers placed a call to petitioner Clifton Park Apartments LLC ("Clifton Park") purportedly seeking to rent an apartment and later complained of housing discrimination. The DHR investigated CityVision's complaint and dismissed it, concluding there was no probable cause. The owner, feeling vindicated, went on the offensive and "retaliated" by sending a letter to CityVision stating it considered the underlying complaint to be "false, fraudulent and libelous."

Based on that letter, CityVision filed a second complaint alleging retaliation against the property owner, asserting that it sent the letter to intimidate CityVision and interfere with the tester's rights, which resulted in DHR adopting a portion of the ALJ's recommendation to award CityVision attorneys' fees. The owner commenced an action under Executive Law §298 to annul the DHR's determination. The Appellate Division, Third Department did so, concluding that, in regard to the retaliation claim, the ALJ and the DHR improperly shifted the burden to the owner and its attorney "to prove … that CityVision did not hold a reasonable belief that Pine Ridge was engaging in housing discrimination."

It did not remit the matter to DHR and instead held that the evidence failed to demonstrate that the owner and its attorney took an adverse action against CityVision under the third prong for a test of retaliation (the requirement that there be an "adverse action" by the alleged retaliator). The court found that the sending of the letter itself by the owner did not rise to the level of actionable retaliation, thus, dismissing the retaliation complaint.[8]

The Holding

The Court of Appeals thought differently. While addressing the

retaliation claim, the court cited the *Burlington N. & S. F. R. Co. v. White* decision by the U.S. Supreme Court in 2006.[9] Much has been written about this decision which many employment practitioners believe expanded what could be considered actionable retaliation in the workplace.[10] The court cited the well-known standard that the adverse element action is satisfied "when a reasonable employee would have found the challenged action materially adverse" in that "it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." The court rejected the notion that such a letter could not, as a matter of law, amount to an adverse action, thus ruling that the question whether the threat of litigation amounts to an adverse action to be a fact specific determination. The court specifically rejected a rule precluding litigation threats from constituting adverse actions under New York's anti-retaliation statute (Executive Law §296(7)) since it was the New York Legislature's directive to liberally construe the statute to eliminate discrimination in this state.

Thus, the matter was put back in the hands of the DHR to review the entire record to determine whether there was a rational basis supporting the agency's decision which, as many know, puts the "retaliator" in an unenviable position.

Takeaway

Whether it be in an employment case, or in a myriad of other matters where one litigant wants to act in "righteous" indignation in response to an affront, according to Newton's Third Law, every action can result in an equal and opposite reaction. Where a retaliation claim is involved, it must be acknowledged that, as it has been previously reported, according to EEOC statistics as of 2023, the number one claim filed with the EEOC in employment discrimination settings was retaliation. Moreover, the federal court statistics on jury verdicts over the prior five years readily demonstrate that even when claims involving the underlying complaint of discrimination are unsuccessful, the retaliation complaints enjoy greater success by far.[11] Considering this incontrovertible fact, clients should be counseled accordingly so that the bad situation they find themselves in does not become exponentially worse.

1. *D'Annunzio v. Ayken*, 876 F. Supp. 2d 211, 217 (E.D.N.Y. 2012) *quoting Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.*, 608 F. Supp. 1187, 1195 (S.D.N.Y. 1985).
2. *Id.*
3. N.Y. Civil Rights Law §74.
4. *Carroll v. Trump*, 664 F.Supp.3d 550, 559 (S.D.N.Y. 2023).
5. *Carroll*, 664 F.Supp.3d at 562 (while the court did not decide as a matter of law whether the many statements attributed to Mr. Trump were or were not a "fair and true" report of a judicial proceeding, he did rule that a jury, a jury of residents from the boundaries of the S.D.N.Y would have to make that determination (and they did) to the tune of $83.300,000.
6. law.justia.com/cases/new-york/court-of-appeals/2023.
7. *Matter of Clifton Park Apartments, LLC v. New York State Division of Human Rights*, 2024 WL 628036, 2024 N.Y. Slip Op. 00793 (Feb. 15, 2024).
8. *Id.*
9. *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006).
10. See e.g. *A Bridge Too Far: The Supreme Court Overextends the Anti-Retaliation Provision of Title VII*, 56 Cath. U. L. Rev. 715 (2007); *Standard for Retaliatory Conduct*, 120 Harv. L. Rev. 212 (2006).
11. https://www.msek.com/blog/workplace-retaliation-claims-a-far-greater-problem-than-employers-realize.

Paul F. Millus is a Litigation Partner at Meyer, Suozzi, English & Klein, P.C. He can be reached at pmillus@msek.com.