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Limiting the Retaliation Claim: ADR Promotes Efficient Resolution and Preserves Corporate Culture

PRESENTED BY JAMS

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An employer's decision to dismiss or demote an employee can be met with any number of retaliation claims in response to the decision, however justified, documented, or vetted the decision may be within the company. An employee having a hard time accepting the bad news may believe the decision was in response to some protected attribute or activity on his or her part.

A claim for wrongful discharge now often has a retaliation claim attached to it. Retaliation claims usually take the form of discrimination claims under Title VII: Claims that one was terminated on the basis of age, race, sex or another protected class attribute. Whistleblower claims form another common class of retaliation claims: Allegations that one was dismissed for disclosing illegal or wrongful conduct on the part of another in a position of authority at the employer, often regardless of the motive for the disclosure.

When other employees choose to identify with the discharged or aggrieved employee, some of the very core values the employer has managed to instill within its company, such as team work, empathy, and sense of loyalty could now threaten the very scope of the retaliation litigation the employer is defending. Other employees may sense other oversights, passed up promotions, perhaps inappropriate behavior. Before long, others feel aggrieved based on the treatment their terminated co-worker received and collective action against the employer could be in

the works. Retaliation litigation particularly challenges those core corporate values in any given case.

Retaliation claims are difficult to prove, but must be taken seriously. Retaliation claims under Title VII require traditional but-for causation, "[t]his requires proof that the unlawful retaliation would not have occurred in the absence of the alleged

wrongful action or actions of the employer." *University of Texas Southwestern Med. Ctr. V Nassar* , 570 U. S.-- , 133 S. Ct. 2517, 2531-34. Retaliation claims can survive dismissal of a discrimination claim or a discharge claim.

Many employment agreements include bilateral arbitration agreements of employment disputes, which limit class action or concerted action. While it is generally believed the National Labor Relations Act, 29 U.S.C. S 151 et. seq. (NLRA) upholds these agreements, unsettled law at present among several circuits on the issue of whether class action waivers often contained in such employment agreements are enforceable awaits review by the Supreme Court. *See Epic Systems Corporation v Jacob Lewis and Ernst & Young LLP v Stephen Morris, et. al, (cert granted).* This issue affects a sizable portion of employment litigation. According to Aron Velling in Law360, in 2015, 8,954 FLSA ("Fair Labor Standard Act," 29 U.S.C. S. 201, et seq) cases were filed, many of which were collective actions.

These collective actions come at great expense. The combined Amici Brief submitted in the *Epic Systems Corporation v Jacob Lewis* matter by the National Association of Manufacturers, the Coalition for a Democratic Workplace and the National Retail Federation surveyed the cost of the class actions in the employment context for 350 companies involved in those 8,954 FLSA cases filed in 2015. The 350 companies spent approximately 462.8 million in response to the sampling of cases. *See* ***2015 Carlton Fields Jorden Burt Class Action Survey.***

Early resolution of retaliation claims is the best approach to confine the matter to a single issue and maintain confidentiality. **ADR** of a retaliation claim can take many shapes: neutral evaluation of an asserted or filed claim; facilitation, mediation or arbitration. Each of these methods have advantages and particularly early resolution keeps the case confidential. Maintaining the dispute to a single employee and a single issue minimizes the risk of damage to the public reputation of the employer while the dispute is resolved. A resolution as simple as offering a neutral evaluation for future employment has resolved a matter. Creative, early ADR efforts bear fruit in this corporate arena.

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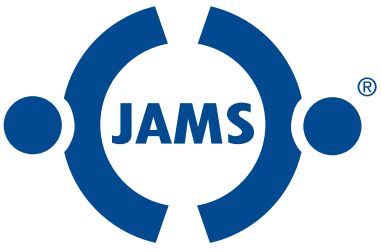

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