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DOL Sues Employer Over Pile of Pennies

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We thought it would be a good break from all the COVID-19-related coverage to delve into a retaliation case under the Fair Labor Standards Act ("FLSA") through the lens of an interesting recent complaint filed by the Department of Labor ("DOL") involving…a huge pile of pennies. A review of the case addresses both the types of actions that would be considered retaliatory under the law, as well as the significance of proximity when analyzing the viability of a case of retaliation. The facts as alleged by the DOL also act as a warning against the role internet postings can play in supporting a legal action.

Facts as Asserted in the Complaint

Though somewhat extraordinary, the facts in the case seem fairly straightforward. Per the DOL's Complaint, an employee of an auto works shop experienced retaliation after he left his job at the shop and complained to the DOL about a violation of wage and hour law. Specifically, the former employee contacted the Wage and Hour Division ("WHD") of the DOL to allege that the auto works shop failed to pay him his final wages, $915.00, upon his departure. In response to this allegation, a WHD representative called the auto works shop to ask about the former employee's last paycheck and received a response that the wages would not be paid.

According to the Complaint, however, within hours of the WHD contacting the auto works shop about the former employee's complaint, a delivery of approximately 91,500 pennies ($915.00 worth of pennies) was deposited on the former employee's driveway. A copy of the former employee's final paycheck sat on top of the pile of pennies with an expletive written on it. In addition to the penny delivery, the owner of the auto works shop allegedly made a statement about paying the former employee in pennies and the Company posted on its website a comment about the press coverage the incident was getting, stating "…know that no one would go to the trouble we did to make a point with out [sic] being motivated."

The Complaint also alleges failure to pay overtime and make/preserve accurate wage and hour records, but the main thrust of the complaint, and most of the specific allegations, revolves around the claim of retaliation for the former employee's report to the WHD.

An Evaluation of Retaliation in the Context of this Case

To prove a claim of retaliation, the plaintiff, usually the current or former employee, though the DOL in this case, must establish (1) the employee engaged in an activity protected by the FLSA; (2) the employee experienced a

materially adverse action; and (3) there is a causal connection between the protected activity and the adverse employment action by the employer. In this case, it seems clear that the first element is met as a division of the DOL, the Agency that filed the Complaint, actually received the claim of failure to pay final wages directly from the former employee. The fact that this action occurred does not appear to be in dispute. And contacting the WHD to report a failure to pay wages in violation of the FLSA is clearly an activity protected by the FLSA.

As to the second element of the claim, this case definitely shows a different type of "adverse employment action" than generally asserted by a plaintiff. Often, the adverse employment action is something like termination, demotion, or some other change in employment conditions. However, the standard for what constitutes an adverse employment action in the context of a retaliation claim is not so limited. Specifically, a "materially adverse action" is anything that may dissuade a reasonable worker from making or otherwise supporting an FLSA claim. Here, the employee may or may not have ultimately received his unpaid wages (unlikely considering that he was paid in a pile of pennies) and payment was delivered in a manner hindering that determination. It also created a big inconvenience and mess for the former employee as the pennies were dumped onto his driveway. A court could certainly determine that the alleged actions of the auto works shop would dissuade other, reasonable employees from similarly complaining to WHD about their wages in the future.

As to the third element of a retaliation claim, if the DOL can prove the facts it asserts in the Complaint, they are also likely sufficient to support a causal connection through temporal proximity and other evidence of a retaliatory motive. Courts often consider the temporal proximity of the protected activity and adverse employment action is assessing whether a plaintiff can establish a causal connection. If an adverse employment action takes place within a short period of time *after* the protected activity, then a court may determine that is sufficient for the plaintiff to meet at least his initial (*prima facie*) burden of proving retaliation. The Supreme Court has held that for temporal proximity to be "sufficient evidence of causality" it must be "very close." In this case, delivery of the pennies onto the former employee's driveway occurred within hours of the WHD contacting the auto works shop to ask about payment of the individual's final wages. Within hours certainly meets the bar of "very close" proximity established by the Supreme Court and may be determined sufficient in and of itself to show causation in this case. Notably, if the facts were slightly different, and the delivery of pennies was already on the way to the former employee's house prior to the auto works shop receiving a call from the WHD, the close temporal proximity would be irrelevant because the materially adverse action was initiated *before* the employer had knowledge of, and thus could be motivated to act due to, the protected activity. In that circumstance, the action may still violate other provisions of the FLSA, like the requirement that the employee be paid the full wages he is owed, but not support the causal connection requirement of retaliation.

In addition, the commentary posted on the website of the auto works shop, although it does not explicitly identify the former employee or the action taken against him, could be additional evidence of retaliatory motive. Indeed, according to the Complaint, the auto works shop posted on its website about being "motivated" to some undescribed action against a "subpar ex-employee." But, again, the proximity in time, as well as the related press coverage mentioned in the website post, would probably show that this comment relates to the same former employee and the mound of pennies that appeared in his driveway. Without the benefit of an Answer from the employer or the facts that the Company and its owner may assert, the outcome of this matter, including the retaliation claim, cannot be determined with any certainty. But it does provide a helpful and interesting case study of retaliation generally and more specifically in the context of the FLSA.