

# LITIGATION INFORMATION MEMO

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## The Intersection of Employer Counterclaims and Retaliation: An Analysis of the Second Circuit's Recent Decision in *Kim v. Lee*

Employers are well aware of the risks a disgruntled employee may pose during their employment and even after their employment has ended. Sometimes, however, employers do not discover an employee's unscrupulous behavior until after an employee has sued their employer for violation of one or more employee protection statutes, i.e., the New York Labor Law (NYLL), Fair Labor Standards Act (FLSA) or New York State Human Rights Law (NYSHRL). These statutes, however, also contain prohibitions against retaliation, leading many employers to question whether they could or should countersue an employee for tortious conduct and potentially risk a claim for retaliation. The Second Circuit in *Kim v. Lee*, 2023 WL 2317248, 22-61 (2d Cir. March 2, 2023), shed some light on this topic and held that an employer's counterclaim is retaliatory when it is baseless or frivolous. The Court did not, however, decide whether non-frivolous counterclaims might support a valid retaliation claim.

In *Kim*, an employee sued his former employer for failing to pay overtime wages in violation of the FLSA and NYLL. During the course of discovery, the employer discovered the employee had failed to return several of the employer's documents. As a result, at his deposition, the employer's attorney repeatedly asked the employee "threatening questions" about employee's retention of the employer's documents, including whether the employee understood that retaining those documents was improper and potentially criminal.

Following the employee's deposition, the employer moved to amend its answer to include counterclaims for (1) breach of fiduciary duties, (2) theft and misappropriation of confidential information, and (3) breach of contract. The lower court granted the employer's motion to add a counterclaim for breach of fiduciary duties but denied the employer's motion to add the remaining two counterclaims.

The employee subsequently initiated a second lawsuit against his employer alleging that his employer retaliated against him by filing or attempting to file the above-mentioned counterclaims. The district court dismissed the employee's retaliation claims following the employer's motion to dismiss and, on appeal, the Second Circuit affirmed dismissal of the employee's retaliation claims.

As with most statutes protecting employees, to establish a claim for retaliation under the FLSA, an employee must prove they were disadvantaged by their employer's "adverse action." In other words, an employee must establish the employer's adverse action "well might have 'dissuaded a reasonable worker from making or supporting similar charges.'" The Second Circuit has opined "that frivolous counterclaims could well dissuade a reasonable worker from pursuing an FLSA claim."

Accordingly, within the Second Circuit, baseless or frivolous counterclaims are considered retaliatory under the FLSA and other similar employee-protection statutes. Counterclaims are baseless and/or frivolous when they cannot be supported by any reasonable interpretation of the applicable facts or legal precedent. However, dismissal of a counterclaim alone does not mean a counterclaim is baseless and/or frivolous.

For example, in *Kim*, the Second Circuit determined all three of the employer's counterclaims were based in fact and presented, at a minimum, a nonfrivolous argument for extending, modifying or revising existing law. Accordingly, even though two of the employer's three counterclaims were dismissed, they were not baseless or frivolous and therefore were not retaliatory. As a result, the employee's retaliation claims were properly dismissed.

While the Second Circuit held in *Kim* that baseless and/or frivolous counterclaims constitute retaliation, the opposite is not necessarily true. The Second Circuit expressly noted that the parties did not submit any arguments regarding whether a non-frivolous counterclaim could constitute retaliation and the Court did "not decide whether and under what circumstances a non-frivolous counterclaim may constitute unlawful retaliation." There are likely limited circumstances under which a non-frivolous counterclaim can constitute retaliation and extenuating circumstances would likely need to be present. However, when determining whether to file a counterclaim against an employee, employers should seriously consider whether the counterclaim is a necessary part of the litigation and whether the counterclaim furthers or protects the employer's business.

For more information on the information presented in this information memo, please contact [Kevin Cope](#), [Stephen Sharkey](#), [Suzanne Messer](#), any attorney in Bond's [litigation practice](#) or the Bond attorney with whom you are regularly in contact.

