

## Avoiding and Handling Retaliation Claims

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### Goals for this Session – Identifying, Evaluating and Avoiding Retaliation Risks

- Identify specific sources of retaliation risks, specifically the laws that prohibit retaliation and protect employees.
- Examine briefly the extent of the retaliation risks present with each statute or law.
- Review fundamental elements of a retaliation claim.
- Evaluate best practices for avoiding retaliation claims.

## Basic Definitions – Implied Malice?

- Webster's defines retaliate as follows: "to repay (as an injury) in kind; to return like for like; *to get revenge.*"
- WordNet defines it as "take revenge for a *perceived wrong.*"

## A Serious Danger

EEOC Charge Statistics 2009: most frequently filed charges

- race (36%),
- **retaliation (36%)**, and
- sex-based discrimination (30%)



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# **Identifying Sources of Retaliation Risks: Federal Laws Prohibiting Retaliation**

## **Title VII, 42 U.S.C. § 2000e-3(a)**

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- **Race**
- **Sex**
- **National Origin**
- **Religion**
- **Color**
- **Compensatory and punitive damages**
- **Protects opposition and participation conduct**

## **42 U.S.C. § 1981**

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- Ensures equal rights to make and enforce contracts, regardless of skin color.
- Encompasses retaliation for race claims.
- Employees can bypass Title VII safeguards.
- EEOC Charge filing NOT a prerequisite under section 1981.

## **Age Discrimination**

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- 40 or older
- No compensatory or punitive damages
- Protects opposition and participation conduct



## Disability Discrimination



- Actual/perceived disability
- Compensatory and punitive damages

### The ADA has 2 retaliation provisions

- Opposition/Participation
- Prohibit Interference, Coercion and/or Intimidation

## And...

- Fair Labor Standards Act
- Family medical leave Act
- Sarbanes-Oxley



## **Protected Conduct**

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- **Opposition**
- **Participation**

## **Proof of Retaliation**

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- **Protected Conduct**
- **Adverse Action**
- **Causal Connection**

### **Crawford v. Metro Government of Nashville**

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- Ms. Crawford participated in internal investigation.
- “Participation” for purposes of anti-retaliation protection does not require formal charge.
- When investigating, consider carefully who to interview.

### **Odds & Ends – Miscellaneous Considerations**

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- Must the underlying complaint have merit?
- Is unreasonable conduct protected?
- Can temporal proximity alone establish a presumption of retaliation?
- Can a retaliation claim survive the termination of an employee’s employment relationship?

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# What Constitutes Adverse Action?

## Old Standard- Tangible Adverse Employment Actions

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- Discharge
- Demotion
- Reduced Compensation
- Suspension



## New (Reduced) Standard *Burlington Northern & Santa Fe v. White*



Supreme Court holds:

Retaliatory acts do not have to be employment or related to work.

*Must be sufficient to dissuade reasonable employee/ applicant in complainant's situation from making or supporting a complaint.*

### Examples:

- **Transfer (even if no loss/ reduction in pay)**
  - Secretary who complained boss was sexually harassing her moved to another, less prestigious position (not working for town's highest executive) at same pay rate and benefits
  - Reassignment of important client account
- **Suspension (even if paid)**
  - Placed on paid, administrative leave after taking FMLA leave
- **Change of job duties (even if within job description)**
  - Temporary reassignment to project depriving supervisor of authority
  - Administrator's loss of decision making discretionary authority
- **EMPLOYER CORRECTION OF THE ACT/ DECISION DOES NOT ELIMINATE LIABILITY! RETALIATORY ACTION MUST BE AVOIDED.**

### **What to do when a complaint is made:**

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- **Affirm anti-retaliation policy**
- **Brief Supervisor**
- **Monitor all employment actions**
- **Get HR approval BEFORE taking any employment action**

### **Coworker Retaliation**

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- **Conduct sufficiently severe to dissuade complaint**
- **Supervisors have knowledge of retaliation**
- **Supervisors condone retaliation or inadequately respond**



***Hawkins v. Anheuser-Bush* (6<sup>th</sup> Cir. 2008)**

## Other Anti-Retaliation Laws

- Workers' compensation
- Jury duty
- State FEP Statutes



## Practical Advice

