

# **Avoiding and Handling Retaliation Claims**

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EXPAND YOUR EXPECTATIONS

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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%)



# Identifying Sources of Retaliation Risks: Federal Laws Prohibiting Retaliation

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

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

#### 42 U.S.C. § 1981

- 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**

- 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**

- Opposition
- Participation

#### **Proof of Retaliation**

- Protected Conduct
- Adverse Action
- Causal Connection

#### Crawford v. Metro Government of Nashville

- 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**

- 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?

# What Constitutes Adverse Action?

#### **Old Standard- Tangible Adverse Employment Actions**

- 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:

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

#### **Coworker Retaliation**

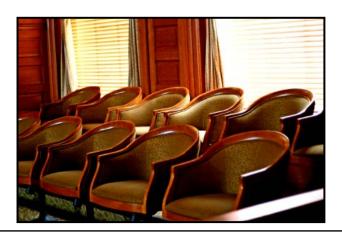
- Conduct sufficiently severe to dissuade complaint
- Supervisors have knowledge of retaliation
- Supervisors condone retaliation or inadequately respond



Hawkins v. Anheuser-Bush (6th Cir. 2008)

#### **Other Anti-Retaliation Laws**

- Workers' compensation
- Jury duty
- State FEP Statutes





#### **Practical Advice**







