

Avoiding and Handling Retaliation Claims

Presented By:
Jonathan Hancock, Esq.
165 Madison Avenue
Suite 2000
Memphis, Tennessee

Email: jhancock@bakerdonelson.com
Phone: 901.577.8202



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

