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# Day-to-Day Strategies for Protecting Against Retaliation Claims

Presented by  
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# Today's Goal

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- Skip entry level overview of retaliation
- Concentrate on the most difficult situations using case studies
- See the separate materials in your packet for a basic overview of the law of retaliation

# Most Common Retaliation Scenarios

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- Employee recently complained about something.
- Employee recently returned from a leave of some sort.

# Retaliation Is About More than the Anti-Discrimination Laws

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- FMLA retaliation
- Workers' compensation retaliation
- "Whistleblower" retaliation
- USERRA retaliation

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# Tools and Traps

# Tools

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## **Tools we have for reducing risk of liability from retaliation claims:**

- Having a lawful motive for adverse employment actions
- Consistent practices
- Documentation
- Managing perception
- Knowledge of the real facts, which requires investigation
- Effective communication

# Traps

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## Here's what gets us in trouble:

- Timing
- Inconsistent practices
- Documentation deficiencies
- Real life, honest to goodness retaliatory motive

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# Scenarios

# Scenario One:

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A property management company has an employee, Aden, who is performing maintenance functions. Aden has recently relocated to the United States from Iraq, where he was born. Aden has had difficulty getting along with one of his co-workers, Walt. He has complained to local management that several of his co-workers, and Walt in particular, are “racist.” As evidence of this, Aden points to what he claims is the practice of the American-born maintenance workers of divvying up the easiest jobs among themselves and leaving the hardest assignments for him. A company investigation has found no evidence of this, and everyone who was interviewed said that Walt is a very nice fellow and that Aden is very argumentative and difficult to work with. Just a few days after the investigation concludes, two things happen almost simultaneously. First, Walt discovers two air conditioner wires that have been improperly and dangerously connected in an area where Aden was recently working. Aden denies doing this, but the company believes he is responsible. That same day, when Aden arrives at work, Walt and some co-workers are watching CNN in the break room, which is reporting on ISIS rebels approaching Baghdad. Walt states that, “Things look scary over there,” and Aden becomes furious and screams violently and inappropriately at him, yelling, “I have family in Baghdad!” What should the company do? What are the risks if the company terminates Aden’s employment?

## Scenario Two:

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A manufacturing company had a discrimination lawsuit go to trial several years ago where an ex-employee, Mr. Fleming, sued for alleged race-based harassment. Several co-employees testified on Fleming's behalf. One of the employees who testified, Mr. Jones, was out on a seasonal layoff when he gave his trial testimony, which was unfavorable to the company, and which was very critical of one particular manager, Mr. Davies. The company hired Mr. Jones back when business picked back up a few months later. Two months later, it disciplined him for two separate on-the-job mistakes at separate worksites where he allegedly damaged doors he was installing and failed to report the damage to management. The first time this happened, the company gave him a disciplinary warning. The second time it happened, the company fired Mr. Jones. Mr. Jones argues that he didn't notice the damage to the doors. The company insists the damage was obvious and expensive to repair. A co-worker claims that when the supervisor Mr. Jones testified against, Mr. Davies, learned about the damage to one of the doors from the complaining customer, rather than contacting Mr. Jones and giving him an opportunity to go back and fix the mistakes, he declared, "I'm going to get him." The company deliberately kept Mr. Davies out of the meetings to decide whether to fire Mr. Jones. Mr. Jones has sued the company for retaliatory discharge under Title VII. Could he win?

## Scenario Three:

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Sandra is an African-American employee who has filed a Charge of Discrimination with the EEOC, alleging that there is a hostile work environment at her marketing company based on race that is adversely affecting her. She is still employed by the company. Several weeks after filing her complaint, she gets into a verbal altercation with her direct supervisor, Dave, who is a white male. Dave loses his temper and shouts so loudly at Sandra that several dozen employees take notice. The manager of the department wants to terminate both Sandra and Dave. Neither of them has been written up previously. Sandra's scores on her written performance reviews have generally been "Meets Expectations," but her department head insists that there are concerns about Sandra's performance across the board that have not made it into the reviews. Can the company safely terminate both employees? If Sandra sues for retaliation under Title VII, could she win?

# Takeways

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- To reduce liability risk, your decision makers must get to the bottom of what's motivating an employment decision.
- Bad motives must be ferreted out and squashed.
- Good motives must be properly documented.
- Effective communication is essential.
- Be mindful of perception.
- Consistency, being mindful of timing, and thinking about whether the employee has been warned or disciplined before are all important.
- You can be smart without letting retaliation worries paralyze you.

## Retaliation: Brief Overview

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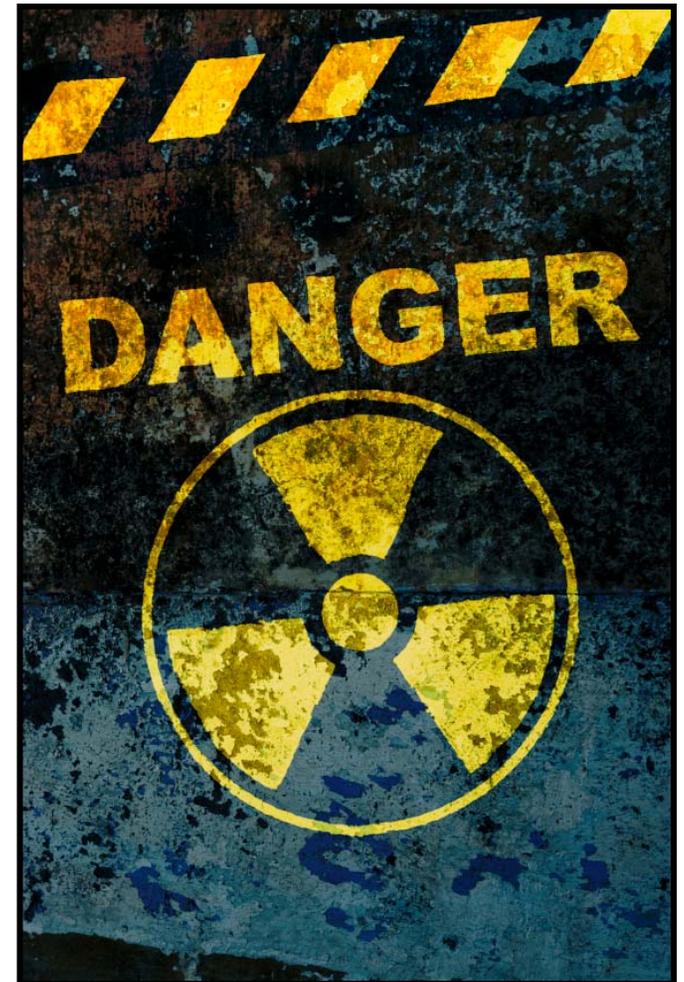
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# A Serious Danger

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EEOC Charge Statistics 2013:  
most frequently filed charges:

- race (35%),
- retaliation (41%), and
- sex-based discrimination (30%)



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# **Common Laws Prohibiting Retaliation**

# Federal Statutes

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Title VII – 42 U.S.C. §2000e-3(a)

Prohibits retaliation against employees who complain about discrimination based on: race, national origin, gender, religion, and ethnicity.

Age Discrimination Employment Act (“ADEA”) – 29 U.S.C. §623(d)

Prohibits retaliation against employees who complain about age discrimination.

Americans with Disabilities Act (“ADA”) – §12203(a)

Prohibits retaliation against employees who complain about disability discrimination.

Equal Pay Act – 29 U.S.C. §206(d)

Prohibits retaliation against employees who complain about unequal pay.

Pregnancy Discrimination Act (“PDA”) – 42 U.S.C. §2000e(k)

Prohibits retaliation against employees who complain about pregnancy discrimination (PDA is incorporated into Title VII).

# Federal Statutes

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Employee Retirement Income Security Act (“ERISA”) – 29 U.S.C. §1140

Prohibits retaliation against employees who exercise their entitlement to employee benefits.

Fair Labor Standards Act (“FLSA”) – 29 U.S.C. § 215(a)(3)

Prohibits retaliation against employees who complain about violations of federal wage and hour laws.

Family Medical Leave Act (“FMLA”) – 29 U.S.C. §2615(a)(2)(b)

Prohibits retaliation against employees who oppose any practice made unlawful by the FMLA.

Occupational Safety Health Act (“OSHA”)

Prohibits retaliation against employees who make good faith reports of their employer’s safety or health violations.

42 U.S.C. §1981

Ensures equal rights to make and enforce contracts, regardless of skin color; encompasses retaliation for race claims; EEOC filing not a prerequisite

# Tennessee Statutes

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Public Protection Act – Tenn. Code Ann. §50-1-304	Prohibits termination of employees solely for refusing to participate in, or remain silent about, illegal activities.
Tenn. Code Ann. §22-4-108	Prohibits retaliation against employees for taking leave for jury service. <i>See Hodges v. S.C. Toof &amp; Co.</i> , 833 S.W.2d 896 (Tenn. 1992).
Tenn. Code Ann. §37-1-410	Prohibits retaliation against employees for reporting suspected child abuse.
Tenn. Code Ann. §2-19-134	Prohibits an employer from terminating employees due to how or whether they vote in a public election.

# Common Law

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- Tennessee Courts recognize a common law cause of action for retaliatory discharge.
- Protects employees who are retaliated against solely for exercising a legally protected right, such as reporting their employer's illegal conduct or refusing their employer's instructions to violate the law.
- Tennessee Courts have prohibited retaliation against employees for filing workers' compensation claims.

# The Anatomy of a Retaliation Claim

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The *Prima Facie* Case:

To establish a *prima facie* case of retaliation, an employee must show:

- He/she engaged in a protected activity,
- The employer made an adverse employment decision, and
- There was a causal connection between the employee's protected activity and the employer's adverse employment decision.

# What is “Protected Activity”?

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Section 704(a) of Title VII expressly protects two types of conduct:

- “Participation”
- “Opposition”

# Examples of Participation

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- Advising a co-worker of her right to file an EEOC charge
- Testifying or assisting in an investigation by the EEOC
- Refusing an employer's request to sign an affidavit to help defend a charge of discrimination filed by another employee
- Threatening to file an EEOC charge may be protected activity, regardless of whether the employee follows through with the threat and files the charge.

# Examples of Opposition

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- An employee's use of an employer's internal complaint procedures
- An employee's informal discussion with a supervisor
- *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (Ninth Cir. 1983) (employer held liable for retaliation after terminating employees who told employer's customer employer was a bigot);
- *Lymon v. Nabil's, Inc.*, 903 F.Supp. 1443 (D. Kan. 1995) (male employee who "spoke up" against perceived harassment of female employees by co-workers engaged in protected activity).

# Examples of Adverse Employment Actions

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- Discharge
- Demotion
- Reduced Compensation
- Suspension

# Temporal Proximity Alone Can Establish Presumption of Retaliation

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- As a general matter, a plaintiff's *prima facie* burden, including the “causal connection” element, is a burden that is “easily met.” *See Herrera v. Churchill McGee, LLC*, No. 13–5211, 2013 WL 6126150, at \*3 (6th Cir. Nov. 21, 2013).
- Although the Sixth Circuit has not been entirely consistent on this point, it has found that a short time period between the protected activity and the adverse action can be sufficient to establish the “causal connection” element.

# Legitimate, Non-Retaliatory Reason

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- Once a plaintiff carries his/her *prima facie* burden, the burden shifts to the defendant to produce a legitimate, non-retaliatory reason for its adverse action.
- If the defendant satisfies this burden, the plaintiff must then demonstrate by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but instead was a pretext designed to mask retaliation for engaging in the protected activity.

# Pretext

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- To demonstrate pretext, a plaintiff must show that the employer's decision:
  - (1) had no basis in fact;
  - (2) did not actually motivate the decision; or
  - (3) was insufficient to explain its conduct.

# Recent Development

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- In *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), the Supreme Court held that Title VII retaliation claims are governed by a different standard of causation than Title VII discrimination claims.
- Specifically, a Title VII retaliation claim requires the plaintiff to show that the employer's unlawful motive was a '**but for**' cause of the employer's adverse action." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013).