Avoiding and Handling Retaliation Claims

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

- 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