

# Retaliation: Why Getting Even is Never a Good Idea



**EXCEL TRAINING CONFERENCE**  
**AUGUST 27 – 29, 2013**  
**DENVER, CO**



# Retaliation Claims are on the Rise



Over the past fifteen years the number of retaliation charges filed with EEOC has tripled.



Supreme Court recently noted the “ever-increasing frequency” of retaliation claims.

# All Statutes have Retaliation Provision



- ① Title VII of the Civil Rights Act of 1964
- ① The Age Discrimination in Employment Act of 1967 (ADEA)
- ① Title I of the Americans with Disabilities Act of 1990 (ADA)
- ① The Equal Pay Act of 1963 (EPA)
- ① Genetic Information Nondiscrimination Act (2008)  
Lilly Ledbetter Fair Pay Act (2009)

# Three Parts to Every Retaliation Case



- 1) The protected activity (opposition or participation)
- 2) The harm that followed the protected activity
- 3) The connection between the two

# What is a Protected Activity?



- o Opposing a practice believed to be unlawful discrimination.
- o Participating in an employment discrimination proceeding.
- o Requesting a reasonable accommodation based on religion or disability.

# Protected Activity?



- Jocelyn feels she is being paid less than a male co-worker because she is female.
- Jocelyn tells her Supervisor that she knows the company is wrong to pay Tim more just because he is a man.
- *Has Jocelyn engaged in a protected activity?*

# Protected Activity?



- Terri is angry that she has to cover for the Receptionist when she takes lunch. She feels it is a big drain on her job to do someone else's job for 45 minutes. She tells her supervisor that the department manager is being a jerk for making her sit up front to fill in during lunch.
- *Has Terri engaged in a protected activity?*

# Opposition



- o Informing employer of belief that unlawful discrimination is occurring or has occurred
- o Threatening to file a charge of discrimination
- o Picketing in opposition to discrimination
- o Refusing to obey an order believed to be discriminatory
- o Reasonable, good-faith belief
- o Manner of opposition must be reasonable

# Opposition?



- Mack believes that his co-worker, Maggie, is being sexually harassed by their Supervisor, Jim. He contacts HR and tells them that Jim is sexually harassing Maggie and gives them details.
- *Has Mack engaged in reasonable opposition?*

# Opposition?



- Mack believes that his co-worker, Maggie, is being sexually harassed by their Supervisor, Jim. Mack catches Jim in the parking lot after their shift and confronts him, while holding a tire iron. He tells Mack that if he does not leave Maggie alone that he will take the tire iron to him and his truck.
- *Has Mack engaged in reasonable opposition?*

# Adverse Employment Action



- Action taken to try to stop someone from opposing discriminatory practice:
  - termination, refusal to hire, denial of promotion
  - Threats, unjustified negative evaluations, increased surveillance
  - Any other action that is likely to deter a reasonable person from pursuing their rights.

# Adverse Employment Action



Burlington Northern v. White, 126 S. Ct. 2405 (2006)



# Post Burlington Northern



- Alleged retaliatory conduct was “materially adverse”, and
- Conduct might have dissuaded a “reasonable employee” from making or supporting discrimination claim.
- Also mandated that retaliation claims be analyzed separately from discrimination claims under Title VII because scope of anti-retaliation provision now extends beyond workplace-related or employment-related retaliatory acts and harm.

Ultimate Employment Act



Materially affects terms, conditions or  
privileges of employment



Adverse action (retaliation)

**Simply put, the key is whether the adverse action would dissuade a reasonable worker from making or supporting a complaint of discrimination.**

# Causal Connection



- Proof that the respondent took an adverse action because the charging party engaged in protected activity
  - Order – that the protected activity preceded the adverse action; *and*
  - Employer knowledge – that the employer was aware of the protected participation or opposition before taking the adverse action.

*University of Texas Southwestern Medical Center v.  
Nassar, 133 S. Ct. 2517 (2013)*



# *University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013)*



- Nassar was on the faculty of UTSMC and on the staff of Parkland Hospital.
- Parkland had an agreement with UTSMC that available positions would be offered first to faculty at UTSMC.
- Nassar complained about his supervisor creating “religious, racial and cultural bias against Arabs and Muslims that resulted in a hostile work environment.”
- He then quit his faculty job at UTSMC and contacted Parkland to possibly retain his staff position with the hospital.
- Chair of Internal Medicine at UTSMC contacted Parkland and reminded it of its agreement with UTSMC; thus, ending Nassar’s employment with Parkland.
- The evidence shows that the Chair of Internal Medicine was motivated, in part, by a desire to retaliate against Nassar because of his discrimination complaint

*University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013)*



- On June 24, 2013, Supreme Court held in a 5-4 decision that the “but for” causation standard applies to Title VII’s anti-retaliation provisions.
- Plaintiff must show that employer would not have taken an adverse action “but for” an improper motive.
- Retaliation being one among several motivating factors is insufficient.



# Retaliation 2013

(the connection is the key)

# Retaliation?



Sue is experiencing performance issues. She is not getting her work assignments completed in a timely manner. You give her a verbal warning. She then tells you that you are treating her unfairly.

*Has she made a protected complaint?*

# Retaliation?



The next day Sue tells you that when she said you were treating her unfairly, she really meant to say that you were treating her unfairly because she is a woman. She points out that you spend all your time assisting Bob, who she claims also misses deadlines, and have no time for her.

*Has she made a protected complaint?*

# Retaliation?



You have had enough of Sue's complaining about the way you supervise Bob, so you consider transferring her to another department. If she doesn't like working for you. Maybe she should work for someone else.

*Can you do this?*

# Retaliation?



Sue then files an internal EEO complaint against you. An investigation concluded that you did not discriminate against her because of her gender. Vindicated, you consider filing a lawsuit against Sue for defamation of character.

*Can you do this?*

# Retaliation?



Two weeks later, you give Sue a written reprimand. The official reason listed is, continued poor performance. Sue files an internal retaliation complaint, which HR begins investigating. Then, Sue files a formal Charge of Discrimination with the EEOC. HR then suspends its investigation because the EEOC is now investigating the matter.

*Should HR do this?*

# Retaliation?



Three months later, Bob grows frustrated because he believes you are giving Sue preferential treatment because of her gender. So, he grabs you by the collar, pins you to the wall and protests the discrimination.

*Can you fire Bob, or should you just quit?*

# Retaliation?



Jose, another employee in your department, filed an internal complaint of discrimination alleging that you denied him training because of his national origin. The investigation did not reveal that Jose was discriminated against. One week later you discharged Jose for excessive absenteeism. He was fired after his 7<sup>th</sup> unexcused absence. The company policy states that employees are only entitled to 5 unexcused absences before firing.

# Retaliation?



Diane has not been performing her job well for the past several months, but you have not counseled her because, after all the stuff that happened with Sue and Jose, you are scared to do so. After meeting with some of the other managers on Monday, you finally decide to meet with Diane on the following Friday to counsel her about her performance and give her a written reprimand. The day before the meeting, Diane complains to HR that she was harassed because of her race.

# Costs of Retaliation



- Reduced productivity
- Low morale
- Absenteeism
- Employee turnover
- Time & costs of internal investigations and responses to EEOC
- Negative press
- Litigation costs/damages

# Best Practices



- Have effective anti-retaliation policies and provide to all employees.
- Through your policies and practices encourage employees to report possible discriminatory conduct.
- Communicate clearly that employees are free to use the policies without fear of reprisal.
- Avoid any policy or practice that would deter employees from complaining about discrimination.

# Best Practices



- Train managers/supervisors to be aware of their anti-discrimination obligations, including specific actions that may constitute retaliation.
- Conduct training on a regular basis. Don't rely on a one-time discussion shortly after hire.
- Reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and share the reasons with the employee.



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