



# Who's On the Firing Line? Tips For Avoiding Wrongful/Retaliatory Discharge Claims

Bill Hanna

Nancy Noall

Walter &  
Haverfield LLP  
attorneys at law

# Trends in the Industry

- EEOC – 2009 saw second highest charge total ever
  - Race (36%) and sex (30%) consistent
  - Age claims decreased (-1.5%)
  - BUT 2009 saw all time highs in religion (3.6%), disability (23%) and retaliation (36%) claims
- More retaliation claims being filed with EEOC – 33,613 in 2009, up from 22,555 in 2006
- More retaliation claims surviving summary judgment

# In General - Discharge

- Sloppy personnel practices can invite challenges to discharge decisions.
- Even where discipline and/or discharge is clearly warranted.

# General Best Practices

- Written work rules
- Handbooks
- Follow your rules and policies
- Progressive discipline
- Policies & rules must be clearly communicated.

# Discipline/Termination

- Supervising
  - Performance evaluations
    - Honest evaluation
    - Legitimate expectations
    - Employee should be informed of failure to meet expectations.

# Discipline/Termination

- Supervising
  - Inconsistent treatment
  - Raise criteria

# Discipline/Termination

- Discipline/Discharges
  - Discharge for Cause
    - Do not let the discharge come as a surprise to the employee – create a paper trail.
    - Was the rule reasonable?

# Discipline/Termination

- Discipline/Discharges
  - Discharges for Cause
    - Was a fair investigation conducted?
    - Interview supervisors
    - Witnesses
    - Employee

# Discipline/Termination

- Discipline/Discharges
  - Discharge for Cause
    - When in doubt, suspend pending investigation.
    - Don't "create" a reason (elimination of position) when you already have a good one (performance).
      - Suggestion of pretext

# Discipline/Termination

- Discipline/Discharges
  - Discharges for Cause
    - Make sure discipline is consistent with past practice.
    - Is discipline fair in this case?
      - Employee notice of rule or performance expectation

# Discipline/Termination

- Discipline/Discharges
  - Discharges for Cause
  - Length of employment
  - Prior performance and/or prior discipline
  - Did the employee engage in “protected” activity?

# Decision to Discharge

- Make by consensus (i.e. not by sole decision maker).
- Should never be made by one involved in direct conflict with employee.
  - Effects of personal animus...?

# Retaliation

- MacMillan Dictionary: “To do something harmful or unpleasant to someone because they have done something harmful or unpleasant to you.”
  - Syn: pay back, get back at, get even, avenge
- Merriam-Webster: “To repay (as an injury) in kind; to return like for like; *especially*: to get revenge.”
- “Revenge is a dish best served cold”
- “An eye for an eye would make the whole world blind”
  - Gandhi
- “He that studieth revenge keepeth his own wounds green, which otherwise would heal and do well” J. Milton

# Retaliation Broadly Prohibited

- |   |   |
|---|---|
| <ul style="list-style-type: none"><li>• Title VII of the Civil Rights Act – race, color, sex, national origin, religious discrimination</li><li>• Ohio Revised Code Chapter 4112</li><li>• Age Discrimination in Employment Act</li><li>• Americans with Disabilities Act (ADA)</li><li>• Workers' compensation law</li><li>• USERRA</li><li>• Sarbanes Oxley Act (SOX)</li><li>• Employee Retirement Income Security Act (ERISA) – pension and welfare benefit plans</li></ul> | <ul style="list-style-type: none"><li>• 42 U.S.C. §§ 1981, 1983, 1985 – civil rights violations, conspiracy</li><li>• Fair Labor Standards Act (FLSA) – minimum wage and overtime pay</li><li>• Family and Medical Leave Act (the FMLA)</li><li>• Occupational Safety and Health Act (OSHA)</li><li>• Equal Pay Act (the EPA)</li><li>• National Labor Relations Act</li><li>• Labor Management Relations Act</li></ul> |
|---|---|

# Anti-retaliation provisions aren't new. Why all the fuss now?

- Progression of court decisions have made retaliation cases easier to prove.
- Employees (and Plaintiff's lawyers) are taking notice.
- Amounts of judgments, settlements are up.
- Juries assume that employer has a motivation to get back at an employee who makes a complaint that would harm the employer – especially when the employer feels the complaint is meritless.

# Retaliation Claims: Then and Now

## Before

- “Add on” to an underlying claim of discrimination
- As the discrimination claim went, so went the retaliation claim
- Side dish

## Now

- ✓ Retaliation claim in its own right
- ✓ Retaliation claim survives summary judgment, when underlying discrimination claim dismissed
- ✓ Main dish

# Retaliation Basics

- The Basics: what is retaliation?
  - Where an employee has engaged in “protected activity”
    - Participation: Employee participated in making a complaint or unlawful activity (such as discrimination) against an employer; or has assisted, testified, or provided information in an investigation of such a complaint; or
    - Opposition: Opposed some unlawful activity by an employer
  - Employer cannot discriminate against the employee because of that protected activity

# Retaliation Basics

- To make out a prima facie case, Plaintiff must show:
  - Engaged in protected activity;
  - Employer knew;
  - Employee suffered adverse action; and
  - Activity and action were causally related
- Recent case law developments impact both “protected activity” and “adverse action” in favor of plaintiffs.

# Retaliation: Protected Activity

- Protected Activity:
  - “Participation activity” in connection with employee’s assertion of protected rights
    - Filing EEOC/OCRC charge
    - Testifying in connection with a charge (even if not employee’s own charge.
    - Etc.
  - Opposition Activity: opposing unlawful discrimination

# Retaliation: Participation Activity

- Slagle v. County of Clarion (3rd Cir. 2006)
  - If charge filed does not, on its face, describe unlawful discrimination, filing not protected
  - Facts:
    - May 2001, employee suspended for failing to cooperate with investigation, chain of command
    - July 2001, suspended again (harassment)

# Retaliation: Participation Activity

- (Slagle, continued)
  - Sep. 2001, filed EEOC charge, claiming discriminated against “because of whistleblowing, in violation of my civil rights, and invasion of privacy.”
  - EEOC dismissed for failure to state claim
  - January 2002, fired for insubordination and lying about absence.

# Retaliation: Participation Activity

- (Slagle, continued)
- Filed 2 more EEOC charges
  - Retaliation
  - Sex discrimination
    - Dismissed by EEOC for lack of evidence of statutory violation
  - Lawsuit: Claimed harassed, disciplined and discharged in retaliation for first EEOC charge

# Retaliation: Participation Activity

- (Slagle, continued)
- Court dismissed suit
  - Held: Plaintiff had made only “general complaint” of “unfair treatment”
  - Held: Plaintiff had not made a claim of illegal discrimination
  - Held: Thus, not, protected Title VII activity

# Retaliation: Opposition Activity

- “Opposition Activity”
- When employee opposes discrimination prohibited by Title VII
  - Can include letters to employer officials, or oral statements of opposition
  - Limitations: activity must be reasonable and based upon employee’s good-faith belief that opposed practice or act is, in fact, discriminatory

# Retaliation: Opposition Activity

- Application and Limits of “Reasonable Conduct” requirement
- Generally things like complaints to management, expressions of support for coworkers who have filed charges, and refusing to participate in discrimination are OK
- Campaign aimed mostly at harming employer is not reasonable, not protected.

# Retaliation: Opposition Activity

- Hochstadt v. Worcester Foundation (1st Cir. 1976)
  - Court upheld discharge of employee who claimed it was retaliation for opposition activity
  - Court: activity was mostly constant complaints, circulation of false rumors, damaging employee relationships.
- Court: employees must continue to play by the basic rules of the workplace and perform on the job

# Retaliation: Opposition Activity

- “Good Faith Belief” requirement
- Employee can be wrong about whether what they’re opposing is unlawful discrimination
- But how wrong can they be and still be protected against retaliation?

# Retaliation: Opposition Activity

- “Good Faith Belief” requirement, continued
- Clark County School Dist. v. Breeden (2001), U.S. Supreme Court
  - Retaliation claimant failed to describe protected opposition activity
  - Employee complained about single incident
  - Supervisor and co-worker laughed at a single, arguably offensive joke told by applicant
  - Court: “No reasonable person could have believed that the single incident...violated Title VII.”

# Retaliation: Opposition Activity

- Protected opposition activity reexamined, and scope broadened, in Crawford v. Metro Gov't of Nashville, 129 S. Ct. 846 (2009).
- Employer conducted sexual harassment investigation about supervisor
- Plaintiff stated in response to questioning that she had been harassed
  - First time she had ever reported.
- After investigation, supervisor was not disciplined
  - But three employees who stated they had been harassed – including Plaintiff -- were terminated

# Retaliation: Opposition Activity

- Plaintiff filed lawsuit alleging retaliation for opposing unlawful conduct
- District Court granted SJ to employer
  - Said complaint during investigation wasn't opposition activity; "merely answered" investigator's questions
- Sixth Circuit affirmed: as Plaintiff never "instigated or initiated" any complaint of harassment, she had not sufficiently "opposed" unlawful conduct
  - Sixth Circuit standard was that plaintiff must have engaged in "active, consistent, opposing activities" to be protected.

# Retaliation: Opposition Activity

- Supreme Court reversed, holding that employee's communication to her employer of a belief that discrimination has occurred constitutes opposition under Title VII
  - It is not necessary that the individual initiate a formal complaint, charge, or investigation
- Nothing in Title VII requires “freakish” rule protecting employees who report discrimination on their own, but failing to protect those who report the same in response to management's questioning

# Retaliation: Adverse Action

- Burlington Northern & Santa Fe Rwy. Co. v. White  
126 S. Ct. 2405 (June 22, 2006)
- Where employer takes action against a worker who has complained about discrimination, how serious does the action have to be before the worker can make out a claim of retaliation? (i.e., what is “adverse action”?)
- A female railroad employee makes a complaint of sex discrimination to her manager. Later, she is reassigned from forklift duty to track duty (both are part of her job description).
- In a separate incident, she is found to have engaged in insubordination and is suspended without pay for 37 days. Her grievance challenging the suspension is upheld, and she eventually receives back pay for the 37 days.

# Retaliation: Adverse Action

- Before this case, there was disagreement in the courts.
- Most courts applied same standard of what is “actionable” to retaliation cases as they did to discrimination cases:
  - had to be a tangible, adverse employment action
  - an ultimate employment decision such as termination, refusal to hire, demotion, decrease in pay, reassignment to lower position, etc.

# Retaliation: Adverse Action

- Supreme Court: standard to prove retaliation is lower than to prove discrimination
- “Reasonable employee” would have found the challenged action “materially adverse” – i.e., it “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”
- Open question: this is a Title VII case – what will standard be under other statutes?

# Retaliation: Causal Connection

- Direct evidence rare (but electronic communications having impact)
- Circumstantial evidence the norm
- Temporal proximity
  - Mickey v. Zeidler Tool & Die (6th Cir. 2008)
  - Upshaw v. Ford Motor Co. (6th Cir. 2009)
- Disparate Treatment

# Retaliation: Emerging Issues

- “Y R U mad at me?”
  - Retaliation one of many areas impacted by employees’ use of technology.
  - Do your supervisors/managers communicate with each other or with employees by e-mail, text or instant message?
  - Keep in mind that instantaneous nature of these methods may enable “venting” or off-the-cuff comments that surface in electronic discovery, etc.

# Retaliation: Emerging Issues

- Scope of coverage of Title VII's anti-retaliation provisions
- Associational discrimination claims increasing
- Associational retaliation?
- Thompson v. N. Amer. Stainless (6th Cir. 2009)(en banc)
  - no cause of action for passive, associated third-party.

# Retaliation: Emerging Issues

- In Thompson, plaintiff's fiancée filed an EEOC charge alleging sex discrimination
- Both worked for N. Amer. Stainless
- 3 weeks after employer notified, plaintiff was terminated.
- District Court – SJ for employer

# Retaliation: Emerging Issues

- 6th Circuit: 2-1 Panel held that
  - Anti-retaliation provisions don't extend to persons who don't personally engage in the protected activity
  - But, associational retaliation undermines the primary purposes of those provisions
  - Thus, implicitly unlawful; would contravene public policy to hold differently.

# Retaliation: Emerging Issues

- 6th Circuit, en banc (10-6): “The authorized class of claimants is limited to persons who have personally engaged in protected activity.”
- Conflict between Title VII’s anti-retaliation provisions and general policy objectives.
- Supreme Court has granted cert. June 29

# Tips To Avoid Retaliation Claims

- Integrate anti-retaliation into workplace policies and procedures and training of employees and managers
- Make sure all workplace complaints are processed properly
  - Who is told? “Need to know” limits should apply; obtain and maintain confidentiality
  - Investigate; mind Crawford’s lessons about what you learn in investigation; take appropriate action
  - Notify complainant: taken seriously, investigated, appropriate action taken (do not specify)

# Tips To Avoid Retaliation Claims

- Maintain adequate performance and disciplinary documentation before, during, and after complaint is made.
- If you wait until employee makes a complaint to scrutinize their conduct and productivity, it creates suggestion of retaliation.
- Understand that performance management or disciplinary correction of employee who has made a complaint is high-risk.

# Tips To Avoid Retaliation Claims

- Protected Activity is Not a Shield – but it is an occasion for caution and a measured approach
- ASK: Would this be happening if person had not made a complaint?
  - Partial cause? Factor?
  - Step back when asking this question.
    - Ensure that supervisors' assertions of consistent treatment, and legitimate non-retaliatory foundation are supportable.

# Discharges for Economic Reasons

- Establish criteria you are going to use.
- Compare employees who are going with those who are staying (individually, and as a group), as to
  - Age
  - Natl. origin
  - Race
  - Sex
  - Disability, etc.
- Be able to produce objective evidence to explain why you chose one individual or group over the others.

# Discipline/Termination

- The Discharge and Afterward
  - Prepare for termination
  - Security issues
  - Witness/Privacy
  - Timing

# Discipline/Termination

- The Discharge and Afterward
  - The exit interview
    - Take notes – can use later if employee makes new complaint.
    - Let employee respond as long as “professional” (might learn valuable information).
    - Be truthful about reason(s) for discharge.

# Discipline/Termination

- The Discharge and Afterward
  - After the exit interview
    - Escort?
    - Personal belongings
    - Counseling
  - File memo.

# Discipline/Termination

- Releases
  - Meaningful chance to consult with lawyer before signing (if over forty, 21 days; or 45 days, depending on the circumstances; with seven days after signing to change mind).
  - Releases appropriate only under some circumstances (and often not in connection with for-cause discharge).

# Discipline/Termination

- Releases
  - May not require employee to waive or release right to file a charge or complaint with EEOC, OCRC, etc. (or to cooperate with such).

**Bill Hanna**  
**[whanna@walterhav.com](mailto:whanna@walterhav.com)**  
**(216) 928-2940**

**Nancy Noall**  
**[nnoall@walterhav.com](mailto:nnoall@walterhav.com)**  
**(216) 928-2926**