Schmidt Labor Research Center
Labor and Employment Law Conference

Employee Rights, Liabilities and Strategy Considerations

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Revenge: Embedded in Our History

Those who plot the destruction of others often perish in the attempt.

— Thomas Moore
What is Retaliation?

- Taking **adverse action** against employees who participate in **protected activity** or oppose unlawful employment practices, **because of** that protected activity.
• Prohibits employers from discriminating against employees on the basis of:
  – Race, Color, Religion, Sex, or National Origin
• Employer may not discriminate against an employee because she has opposed a practice made unlawful by Title VII
The ADA

- Prohibits discrimination against qualified individuals with disabilities
- Requires employers to make reasonable accommodations to applicants and employees
- No person may discriminate against an individual because she has opposed any act or practice made unlawful by the ADA
• Requires employers to provide employees with 12 weeks of job-protected, unpaid, leave for qualified reasons
  – For the employee’s own serious health condition, the serious health condition of a family member, the birth or placement of a child, and certain reasons related to military leave.
• It is unlawful for an employer to discharge or in any other manner discriminate against an individual for opposing any practice made unlawful by this chapter
Retaliation: Employee’s Burden

• The employee must prove:
  – Protected activity;
  – Adverse action; and
  – A causal connection
    • But for; temporal proximity; intervening acts

• Preponderance of the evidence/Clear and convincing

• If no direct evidence: *McDonnell Douglas* burden-shifting framework
  – Prove the above → the burden shifts to the employer to provide a legitimate, non-
    retaliatory reason → burden shifts back and remains on the employee
• Protected Activity
  – Participation clause – “make a charge, testify, assist or participate in any manner in proceedings or hearings under the statutes”
  – Opposition clause – “oppose acts made unlawful by the statutes”
• Adverse Action
  – Need not be related to the employee’s terms and conditions of employment and can be any conduct or harm that has the effect of discouraging a “reasonable employee” from making a discrimination complaint
• Causation
  - But for causation - *University of Texas Southwestern Medical Center v. Nassar*
Federal Whistleblower Statutes Are Now Common

- False Claims Act
- Sarbanes-Oxley
- Fraud Enforcement & Recovery Act
- Dodd-Frank
- American Recovery & Reinvestment Act 2009
- Consumer Product Safety Act
- Since 2006, 16 states have strengthened laws
What is a Whistleblower?

1. Make good faith reports of suspected misconduct

   **Examples:**
   - Non-compliance with accepted accounting practices
   - Bribery in foreign transactions
   - Violations of health and safety laws
   - Securities violations, such as insider trading

2. Are protected from retaliation for blowing the whistle

3. May be entitled to rewards from the government for blowing the whistle on certain misconduct
Rhode Island State Laws with Anti-Retaliation Provisions

- **Fair Employment Practice Act**
  - Prohibits discrimination on the basis of race, sex, national origin religion, gender identity or expression
- **Rhode Island Civil Rights Act**
  - Duplicates the FEPA but with a 3-year SOL
- **Civil Rights of People with Disabilities Act**
  - Prohibits discrimination on the basis of disability
- **Pregnancy Discrimination Act**
  - Prohibits discrimination on the basis of pregnancy or pregnancy related condition
- **Parental and Family Medical Leave Act**
  - Guarantees 13 weeks of leave for qualifying reasons with job protection
- **Healthy and Safe Families and Workplaces Act**
  - Paid sick leave of up to 40 hours
- **Whistleblowers’ Protection Act**
  - Reporting violations of a law, rule or regulation
Rhode Island Whistleblowers’ Protection Act

• It is unlawful for employers to “discharge, threaten, or otherwise discriminate against an employee” because the employee “has reported or is about to report,” in good faith, a violation of any law

• The statute further protects employees who are requested by a public body to participate in an investigation or hearing

• Employees also may not be discriminated against for refusing to violate, or refusing to assist in a violation, of any law or regulation

• The Act imposes a heightened burden of proof on the employee if the alleged report of a violation of law was made verbally — in that event, the employee must establish by clear and convincing evidence that the report was made.
Whistleblowers’ Protection Act: Protected Activity

• Protected Activity
  – Conduct opposed need not be unlawful BUT must have a reasonable belief that it is.
  – Subjective and Objective – employee must believe in good faith that the employer engaged in an unlawful practice AND belief must be objectively reasonable.
    • Based on the knowledge available to a reasonable person in the same factual circumstances and with the same training and experience as the employee.
  – Something more than passing a report "up the supervisory chain."
  – Requires conduct beyond what the employee finds worthy of criticism or requiring correction — the subject of the whistleblowing must amount to a violation of an identified federal, state or local law or regulation.
Whistleblowers’ Protection Act: Adverse Action and Causation

- Adverse employment action that is “materially adverse” and “inflicts direct economic harm” must be causally linked to the protected conduct.
  - Paid administrative leave, even with requirement to attend an IME, is not adverse action.

- Causation — requires that there is a "substantial nexus" between the protected report of a violation by the employee and the adverse employment action, which must be based on more "than pure speculation."
Remember Key Defenses

- No protected activity
  - Good investigation
  - Good documentation
- No adverse action
  - Nothing of consequence was taken
- No causation
  - Timing
  - Intervening act or consideration of surrounding facts
The Elephant in the Room

• Do you want your employees to complain internally rather than go to the RICHR, SEC, FDA, DOJ, EEOC, OSHA, etc.?

• Do you have an effective system that encourages them to do so?
Retaliation: How To Minimize Its Occurrence

- 2016 EEOC’s Guidance on “Promising Practices” to Minimize Retaliation
  - Written employer policies;
  - Training;
  - Provide anti-retaliation advice and individualized support for employees, managers and supervisors;
  - Proactive follow-up; and
  - Review consequential employment actions to ensure equal employment opportunity compliance.
Hypothetical: Retaliation in Practice

• The get-out-of-jail-for-free card
  – Union environment
  – Serious patient care errors
  – Every time the employee nearly killed a patient he filed a complaint of discrimination against his manager

• What could the employer do to avoid this issue?
Hypothetical: Retaliation in Practice

• Public shaming retaliation
  – Employee complains that manager assaults her
  – Manager’s boyfriend is also a manager
  – Employee’s husband is fired from a town job and there are reports that pornography was found on his work computers
  – Manager’s boyfriend decides to bring 25 copies of the local newspaper reporting the pornography in to the workplace and distribute

• Is this unlawful retaliation? What kind?
Hypothetical: Retaliation in Practice

• Twisting the Facts
  – Visiting nurse is instructed to update a patient record, after the fact, to allow for insurance billing;
  – Nurse refuses, claiming it is “fraud” and “illegal;”
  – Nurse is trained to document “tape irritation” as “tape burn” to allow for insurance billing;
  – Nurse refuses to document using the requested terminology, but tells no one;
  – After nurse resigns she claims constructive discharge and whistleblower retaliation.

• What must the nurse prove?
Questions?