

AVOIDING RETALIATION AND WHISTLEBLOWER CLAIMS

31st Annual Employment Law Conference

Tracy A. Leahy
(313) 965-8533
tleahy@clarkhill.com

April 29, 2015

CLARK HILL

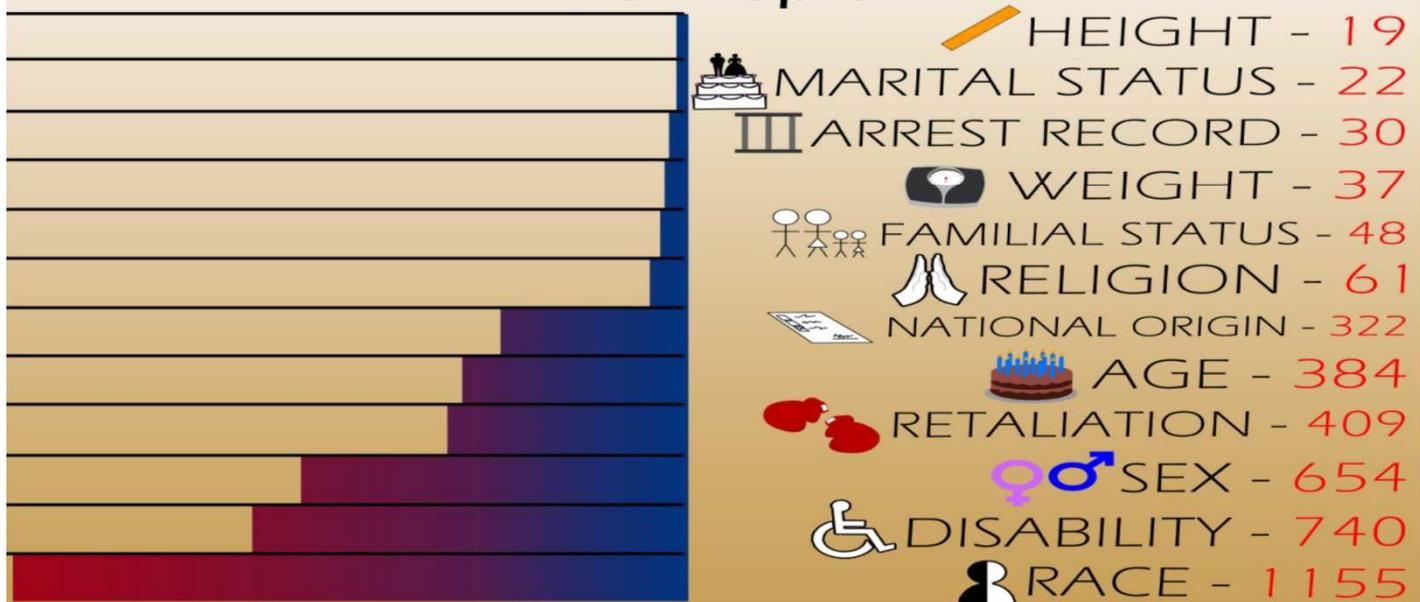
RETALIATION CHARGE STATISTICS – EEOC

	2006	2007	2008	2009	2010	2011	2012	2013	2014
Total Charges	75,768	82,792	95,402	93,277	99,222	99,947	99,412	93,727	88,778
Retaliation All Statutes	22,555 29.5%	26,663 32.3%	32,690 34.3%	33,613 36.0%	36,258 36.3%	37,334 37.4%	37,836 38.1%	38,539 41.1%	37,955 42.8%
Retaliation Title VII	19,560 25.8%	23,371 28.3%	28,698 30.1%	28,948 31.0%	30,948 31.0%	31,429 31.4%	31,208 31.4%	31,478 33.6%	30,771 34.7%

MOST FREQUENT CIVIL RIGHTS COMPLAINTS

MOST FREQUENT CIVIL RIGHTS COMPLAINTS

Number of Complaints
Per Topic



OVERVIEW OF STATUTES WITH RETALIATION PROVISIONS

- Numerous federal and state statutes protect employees from retaliation in certain circumstances:
 - Title VII
 - ADEA
 - ADA
 - FLSA
 - OSHA
 - FMLA
 - GINA
- These statutes provide a separate cause of action for retaliation that do not require a finding of discrimination

WHY RETALIATION CLAIMS ARE ON THE RISE

- Easily identifiable
- Public popularity
- Employees becoming more aware of their rights
- Many different avenues to recovery-virtually all federal and state employment laws have anti-retaliation provisions
- Court decisions have made retaliation cases easier to prove
- Court decisions have expanded the pool of people who can sue for retaliation
- Jury Appeal – It is expected that a supervisor who learns that a subordinate has complained about the supervisor's behavior will have difficulty treating the subordinate as if no complaint was made. Juries know that it is human nature to want to strike back at people who accuse them of wrongdoing

RETALIATION AND WHISTLEBLOWER CLAIMS:

The Fundamentals

CLARK HILL

ELEMENTS OF A RETALIATION OR WHISTLEBLOWER CLAIM

- To establish a claim, a plaintiff must prove:
 - He or she engaged in protected activity
 - The employer took adverse action and
 - There is a causal connection between the protected activity and the adverse action
- Title VII, ADA, ADEA, and GINA plaintiffs alleging retaliation must first file a charge with the EEOC

PROTECTED ACTIVITY IN RETALIATION CLAIMS

- Participation: An employee participates in an activity protected by the employment statute
- Opposition: An employee opposes an unlawful employment practice prohibited by the employment statute
 - The employee need only have a good-faith, reasonable belief that the complained of conduct violated the law

PROTECTED ACTIVITY IN WHISTLEBLOWER CLAIMS

- An employee engages in protected activity under the Whistleblowers' Protection Act (WPA) when the employee:
 1. “Reports or is about to report, verbally or in writing”
 2. A violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States
 3. To a “public body”
- The WPA also applies if a person acting on behalf of the employee reports or threatens to report

PROTECTED ACTIVITY IN WHISTLEBLOWER CLAIMS

- The WPA does *not* protect reports made by an employee:
 - That the employee knows are false or
 - That are given because the employee is requested to participate in an investigation by a public body

ABOUT TO REPORT

- To establish a claim under the “about to report” prong of the WPA, a plaintiff must show:
 1. By clear and convincing evidence that s/he or a person acting on his/her behalf was about to report a violation or suspected violation of the law, and
 2. That the person who terminated the plaintiff was aware that s/he was about to make a report before s/he was terminated. *Jennings v. County of Washtenaw*, 475 F. Supp. 2d 692 (E.D. Mich. 2007)

ABOUT TO REPORT

- “An employee who is ‘about to report’ a violation or a suspected violation is one who ‘is on the verge of’ doing so.” *Jennings, supra*, quoting *Shallal v. Catholic Social Services.*, 566 N.W.2d 571, 575 (Mich. 1997)
- “[T]he language of the Whistleblowers’ Protection Act intentionally reduces employee protection, the more removed the employee is from reporting to a public body.” *Jennings, supra; Shallal, supra*
- The WPA does not protect an employee who is “perceived to be a whistleblower, but who has not otherwise engaged in protected activity as defined by the act.” *Allen v. Charter Co. of Wayne*, 192 Fed. Appx. 347 (6th Cir. 2006)

ADVERSE ACTION – RETALIATION CLAIMS

- Traditionally, adverse action required the employee to demonstrate:
 - The action was materially adverse in that it is more than a “mere inconvenience or an alteration of job responsibilities” and
 - There must be some objective basis for demonstrating that the change is adverse
- In *Burlington N & S.F.R. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court lowered that standard and adopted the following definition of adverse action for the purposes of a retaliation claim:
 - Any materially adverse action that would have *dissuaded* a reasonable person from making or supporting a charge of discrimination (*i.e.*, chilling effect standard)

ADVERSE ACTION

- *Burlington* extends the definition of adverse action beyond an employer's actions that materially affect the terms and conditions of employment
 - This is not the same standard applicable to a discrimination action
- In *Thompson v. North Amer. Stainless, LP*, 131 S. Ct. 863 (2011), the Supreme Court further extended the definition of adverse action to include adverse actions taken against any “person aggrieved” by an alleged employment practice (*i.e.*, associational retaliation)

EXAMPLES OF ADVERSE ACTION

- Deviation from policy
- Denial of favorable transfer or job assignment
- Imposition of a less desirable transfer
- Imposition of discipline
- A less desirable work schedule
- Manufactured negative evaluations
- Unjustified negative references to workplace behaviors
- Increased surveillance
- Reassignment of job duties
- Suspension with or without pay

CAUSAL CONNECTION – RETALIATION

- Retaliation claims require plaintiffs to prove a higher causal connection standard than Title VII status-based discrimination claims
 - In *University of Texas SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the Supreme Court held that Title VII retaliation claims require a “but for” causation standard
 - “Because” = “but for”
 - Title VII status-based claims involve the lesser “motivating factor” causation standard

CAUSAL CONNECTION – WPA

- Employers are entitled to “objective notice of a report or a threat to report by the whistleblower” before the plaintiff has a valid claim under the WPA. *Kaufman & Payton, P.C. v. Nikkila*, 200 Mich. App. 250, 257 (1993)
- “Objective notice has been interpreted by the courts to mean that the person who fired the employee was aware of the protected activity in which the employee engaged.” *Jennings*, 475 F. Supp. 2d at 713

RETALIATION AND WHISTLEBLOWER CASES

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

IS THE INDIVIDUAL COVERED BY THE WPA?

- The WPA prohibits retaliation “*against an employee*” MCL 15.362
- In *Wurtz v. Beecher Metropolitan District*, 495 Mich. 242 (2014), the Michigan Supreme Court held that the WPA does not apply to: (1) applicants/prospective employees, or (2) “a contract employee whom the employer declines to rehire for a new term of employment”
 - Presumably, this includes contracted college professors without tenure, independent contractors, individuals with fixed duration employment contracts

ARE THERE SPECIAL CONCERNS WHEN CONSIDERING IF A PUBLIC EMPLOYEE WHO BLOWS THE WHISTLE IS COVERED?

- Employees of a public body may report violations or suspected violations of the law internally to satisfy the first prong of the WPA
- In *Brown v. Mayor of Detroit*, 478 Mich. 589 (2007), the Michigan Supreme Court held that:
 - The WPA does not require that an employee of a public body report violations or suspected violations to an outside agency or higher authority
 - There is no requirement that an employee who reports violations or suspected violations only receives protection under the WPA if the reporting is outside the employee's job duties

IS THE EMPLOYEE COVERED IF THE MOTIVATION FOR FILING A REPORT IS IMPROPER?

- In *Whitman v. City of Burton*, 493 Mich. 303 (2013), the Michigan Supreme Court held that there is no "primary motivation" or "desire to inform the public" requirement contained within the WPA
 - Overturned *Shallal v. Catholic Social Services of Wayne County*, 455 Mich. 604 (1997)
- An employee who makes a report or is about to make a report is covered by the WPA even if the motive is improper or purely personal to the employee

IS MOTIVE EVER RELEVANT?

- *Whitman* = plaintiff must establish the employer took the adverse employment action “because of” the plaintiff’s protected activity
- WPA uses the same “because” of language as Title VII’s anti-retaliation provision
- The “but for” causation standard means that the plaintiff must show the protected activity was *the* reason for the adverse action; not that it was a *factor* in the adverse action

IS MOTIVE EVER RELEVANT? (CONT.)

- The “but for” standard prevents “frivolous” claims and precludes an employee from forestalling lawful actions by making unfounded complaints
- If the employee cannot undermine the employer’s legitimate, non-retaliatory reason, the employee cannot establish “but for” causation under the WPA

WHAT IF THE DECISION WAS ALREADY UNDERWAY?

- A plaintiff cannot satisfy the causal connection requirement where the employer was *considering* the adverse employment action before it knew of the alleged protected activity
 - In *Clark County Sch. Dist. v Breeden*, 532 U.S. 268 (2001), the Supreme Court held that “[e]mployers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality”

DOES THE CAT'S PAW THEORY APPLY TO RETALIATION OR WPA CLAIMS?

- *Staub v. Proctor*, 562 US 411 (2011): Under the “Cat’s Paw” theory, an employer can be liable for discrimination if the final decision maker acts innocently, but based on input from a biased supervisor
- *Sims v. MVM, Inc.*, 704 F.3d 1327 (11th Cir. 2013): Cat's paw theory does not apply to cases under the ADEA due to the fact that the plaintiff must show s/he suffered an adverse employment action "because of" (*i.e.*, “but for”) his or her age
 - Cat’s paw theory is only applicable in cases involving the "motivating factor" standard”
- Apply same argument to retaliation and whistleblower claims

WHAT IF THE EMPLOYER DEVIATES FROM A PERFORMANCE IMPROVEMENT PLAN?

- An employer's deviation from a performance improvement plan schedule is evidence of retaliation. *Montell v. Diversified Clinical Services*, 757 F.3d 497 (6th Cir. 2014)
- While on a PIP, the employee I *Montell* complained of sexual harassment. The employee was asked to resign the day after she complained
- The Sixth Circuit held that employer's failure to follow the PIP was evidence of a retaliatory motive

AVOIDING RETALIATION CLAIMS

CLARK HILL

IMPLEMENT A POLICY PROHIBITING RETALIATION

- Could be a part of anti-discrimination and harassment policy
 - Policy should encourage employees to come forward with complaint without fear of reprisal
 - Policy should include a complaint procedure for employees to report retaliatory conduct
 - Complaint procedure should include several supervisory levels

TRAIN MANAGERS AND SUPERVISORS

- Provide training on the types of conduct that constitute retaliation
- Provide training on how to respond when a complaint is brought to their attention
- Document training efforts
- After a complaint is made, provide counsel concerning non-retaliation obligations
- Train managers and supervisors on best practices to avoid retaliation claims
 - Encourage employees to make complaints
 - Protect employees who make complaints
 - Listen to employees and solve problems
 - Document poor performance and counsel employees

TRAIN EMPLOYEES

- Train employees on the complaint procedure
- Post the complaint procedure and any required governmental postings where employees will see them
- Periodically remind employees of the complaint procedure
- Actively seek complaints from employees who have raised problems or concerns, and solve the problems if possible and as soon as possible
- Involve human resources in employment decisions that could be considered adverse to ensure no retaliation is involved in the decision making process

DO NOT IGNORE COMPLAINTS

- Proactively engage employee to determine complaint
- Provide employee with a copy of non-retaliation policy
- Offer to assist the employee if problems persist
- Document discussion
- Follow-up to ensure there have been no further incidents

MAINTAIN CONFIDENTIALITY OF COMPLAINT

- The fewer people who know about a complaint, the less likely a retaliatory action will be taken
- Limit those who know about the complaint to those who need to know
- Remind those who know about the complaint that retaliation will not be tolerated
- Practice Note: Prior knowledge of the employee's complaint is essential in proving a retaliation claim

CONSIDER OTHER REMEDIAL MEASURES

- Consider allowing the employee to report to a different supervisor
- Change those who conduct performance evaluations
- Implement reduced or alternative work scheduled (have employee sign off on change so as not to be viewed as retaliatory)

DISCIPLINING AN EMPLOYEE WHO HAS COMPLAINED

- Discipline is retaliatory only if it is taken because the employee complained
- You can and should enforce your policies and take disciplinary action for a violation of those policies
- If you must take adverse action, document the reasons and be prepared to show that those reasons are unrelated to the employee's complaint
- Hopefully, those reasons are supported by documentation which pre-dates the employee's complaint

BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Make certain work records and performance evaluations are conducted on time and contain current, factual information
- Be consistent in the application of policies and the imposition of discipline
- Encourage managers and supervisors to include human resources oversight whenever an adverse action or the imposition of discipline is undertaken
- Remember, sloppy administration negatively affects credibility
- Actively remind the subject of any complaint or investigation that any conduct of a retaliatory nature toward the complaining party is strictly prohibited

BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Remind supervisors that they serve as guardians of anti-retaliation compliance
- Observe group dynamics -- condoning abuse by co-workers of a complaining employee will not be excused and, if pervasive, will form the basis of a retaliation claim
- Watch for pranks, destruction of personal property, workspace indignities, and other mistreatment and take prompt action to stop them

BEST PRACTICES THAT HELP AVOID RETALIATION CLAIMS

- Periodically monitor the treatment of employees that have engaged in protected activity
- Follow-up tends to neutralize allegations of retaliation
- Remember adherence and attention to your policy helps to defeat and reduce retaliation claims

QUESTIONS?

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

Thank You



Tracy A. Leahy

(313) 965-8533

tleahy@clarkhill.com

LEGAL DISCLAIMER

Note: This presentation/document is not a substitute for or intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.