

SURVIVE THE GUNFIGHT AT OK CORRAL WITH POLICIES AND PRACTICES AGAINST RETALIATION

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I. Laws Prohibiting Retaliation.

Employees are protected from retaliation by their employers under a variety of laws. Some of those laws are the following:

1. Oklahoma's Workers' Compensation Act;
2. The Oklahoma Anti-Discrimination Act;
3. Title VII of the Civil Rights of 1964;
4. The Family and Medical Leave Act;
5. The Age Discrimination in Employment Act;
6. The American's With Disabilities Act;
7. The Fair Labor Standards Act;
8. The Civil Right Act of 1866;
9. The Occupational Safety and Health Act;
10. The Sarbanes-Oxley Act of 2002.

These protections are generally available:

1. To employees who exercise their rights under the relevant act including complaining internally or externally about an employer's violation of the act;
2. To employees who aid, assist, or support the complaint process or investigation;
3. To applicants or ex-employees;

4. Even when the underlying complaint is invalid¹.

In addition to statutory basis for retaliation, the Oklahoma Supreme Court has created a statutory claim for retaliation when an employer terminates an employee because the employee has engaged in conduct which is protected by a clear and compelling public policy of Oklahoma (for example, whistle blowing) or refuses to act in violation of an established and well defined public policy of Oklahoma. *Burk v. K-Mart Corp.*, 770 P.2d 44 (Okla. 1989).

II. Management Concerns.

One of the most difficult management problems arises when an employee who has exercised his/her rights under one of the laws prohibiting retaliation remains an employee. Any employment action considered adverse by such employee can become the basis of a retaliation claim. The potential for such claims make conducting "business as normal" a litigation mine field.

Consequently, it is important for employers to know what type of employment actions can lead to a retaliation claim so that they can properly weigh the legitimate business reason for the action against the risk of litigation. The United States Supreme Court in *Burlington Northern & Santa Fe Railroad Co. v. White*, 126 S.C. 2405 (2006), adopted an expansive approach to defining what employer action could subject an employer to liability for retaliation. Prior to *White*, an employee claiming that adverse action was taken against him/her had to show that the employer's action rose to the level of a material employment decision that affected the terms or conditions of employment, such as hiring, discharging, failing to promote or grant leave. See *White v. Burlington Northern & Santa Fe Railroad Co.*, 364 F.3d 789 (6th Cir. 2004). However, under the approach adopted by the U.S. Supreme Court in *White* an employee may now show that the action was adverse, if the action "would likely have dissuaded a reasonable worker from making or supporting a charge of discrimination."

If it was difficult before *White* to evaluate the likelihood that an employment action would be determined retaliatory, it is now nearly impossible. The evaluation of what a reasonable worker would find a discouragement to exercising his or her rights is the type of factual analysis that courts usually allow juries to decide.

Nonetheless, all is not lost. Cases following the decision in *White*, as well as legal scholars do indicate that the evaluation must be one that is objective from a reasonable worker point of view and not the subjective view of the complaining employee. These authorities are an aid for employers who want to assess whether their business decisions are likely to draw a retaliation claim.

¹ In some situations the protection from retaliation does not apply when an employee is found to have complained in bad faith. For the most part, employers should never take action that might be determined retaliatory based on the employer's conclusion that the employee's complaint was in bad faith. This defense to a retaliation claim is best asserted, when appropriate, in litigation.

III. What Does an Employee Have to Show to Prove Retaliation

Employees who bring claims of retaliation must show that:

- 1: He/she engaged in protected activity;
2. He/she experienced adverse action,
3. The adverse action occurred because of his/her protected activity.

IV. What Actions May Be Considered Adverse for the Basis of a Retaliation Claim.

1. General rule.

- A. An employment related action may be considered adverse if it would be enough to discourage a reasonable employee/applicant/ex-employee under the circumstances from bringing or supporting a claim.
- B. An action outside the workplace, regardless of whether it would affect employment may be considered adverse if it would be enough to discourage a reasonable employee/applicant/ex-employee under the circumstances from bringing or supporting a claim.
- C. Petty slights or minor annoyances are not enough.
- D. The subjective evaluation of the complaining employee is not determinative.

V. Recent Supreme Court Decision Extending Retaliation Claims To Witnesses Who Merely Answer Questions In An Internal Investigation.

In *Crawford v. Metropolitan Gov't*, 105 FEP Cases 353 (U.S. 2009), decided on January 26, 2009, the United States Supreme Court settled a conflict that existed in the United States Courts of Appeals regarding the protection available to an employee who "opposes discrimination" by merely answering questions in an internal investigation.

In *Crawford*, the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") was conducting an investigation into an internal complaint of sexual harassment made against its employee relations director, Gene Hughes. Crawford, who was not one of the individuals bringing the complaint, was one of the employees interviewed. In the interview she described several incidents of sexually harassing behavior by Hughes. Although Metro took no action against Hughes, it did fire Crawford and the two other accusers soon after finishing the investigation. In Crawford's case, Metro claimed that she was fired for embezzlement.

Crawford filed an EEOC charge and later initiated a civil suit. The trial court granted summary judgment to Metro. The court held that Crawford had not engaged in protected activity triggering the anti-retaliation provisions of Title VII. Specifically, the court held that she had not engaged in "opposition" to discrimination, because she had not instigated or initiated any complaint, nor did she take any further action following the investigation prior to her firing. Additionally, the trial court said that because her employer's internal investigation was not conducted pursuant to a pending EEOC charge, she could not claim protection under the "participation" clause of Title VII. (Title VII protects employees from retaliation for two kinds of protected activity. Generally, those protected activities are: 1) opposing discriminatory practices even though no EEOC charge has been filed and 2) participating in an investigation as a result of an EEOC charge.)

The Court of Appeals for the Sixth Circuit affirmed the decision of the trial court. It held that to constitute protected activity, opposition must involve active, consistent opposition to discrimination.

The United States Supreme Court disagreed and reversed the lower courts' decision. The Court held that :

There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute [Title VII] requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss ask a question.

Metro argued that this ruling "lowered the bar" for retaliation claims and made it less likely that employers would look into what may be happening if retaliation is an "easy charge" when things go bad for the employee who responded to inquires.

The Court rejected this argument as well, noting that employers are subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to avoid liability for the discriminatory activity.

VI. Additional Examples of Adverse Actions:

The actions listed below may be adverse employment actions, but will not necessarily amount to a finding of retaliation unless the facts and circumstances prove that but for the employer's intent to retaliate against an employee exercising his/her rights such action would not have occurred.

- A. Discharge from employment;
- B. Failure to promote;
- C. Changes in pay;

- D. Transferring or failure to transfer an employee to another location or position;
- E. Changing an employee's actual job duties, even if all duties are within job description.
 - (1) For example, re-assignment of duties may be an adverse action when they are more arduous and dirtier, and less prestigious because the prior duties required more qualifications. *Burlington Northern & Santa Fe Railroad Co. v. White*, 26 S.C. 2405 (2006) (arising under Title VII). In *White*, the plaintiff was a yard worker. The duties of a yard worker included driving a forklift although normally one person was assigned the forklift duties. After the plaintiff complained about sexual harassment she was reassigned from the easier forklift duties to the more difficult yard duties. She claimed the re-assignment was an adverse action. The Court agreed.
- F. Suspension without pay, even when employee is reinstates with pay. *Burlington Northern & Santa Fe Railroad Co. v. White*, 26 S.C. 2405 (2006) (arising under Title VII).
- G. Increased "monitoring" of an employee's performance or activities. *Burlington Northern & Santa Fe Railroad Co. v. White*, 26 S.C. 2405 (2006) (arising under Title VII).
- H. Filing criminal charges against the employee. *Burlington Northern & Santa Fe Railroad Co. v. White*, 26 S.C. 2405 (2006) (arising under Title VII).
- I. Giving poor references on the employee, including telling prospective employers that the employee filed a claim for discrimination or is not eligible for rehire.
- J. Changing an employee's schedule when the change materially affects the employee. For example, changing the shift of a single mom from 7 a.m. to 3 p.m. to 3 p.m. to 7 a.m., affecting her ability to pick up her school aged children. *Burlington Northern & Santa Fe Railroad Co. v. White*, 26 S.C. 2405 (2006) (arising under Title VII).
- K. Exclusions from meetings or training lunches.
- L. Refusing to grant leave, paid or unpaid.
- M. Denial of pay increases.

- N. Denial of previously approved paid time off.
- O. Co-worker retaliation or hostility, if severe, and if condoned by the employer.
- P. Filing a lawsuit against the employee or a counterclaim in a lawsuit brought by the employee.
- Q. FBI's failure to investigate death threats made against an employee by a federal prison inmate, as it would have ordinarily done for the public. *Rochon v. Gonzales*, 438 F.2d 1211 (D.C. 2006)..
- R. Transfer of employee to lower paying shift and subsequent placement on administrative leave within days of learning that employee assisted fellow officer in sex discrimination action. *McConough v. City*, 98 FEP Cases 481 (1st Cir. 2006).
- S. Transfer of employee that did not change salary, benefits, job title, grade, or hours of work was adverse employment action because he was stripped of top management responsibilities for policy formation, resource allocation, planning and evaluation of programs and procedures, financial and personnel management; he was no longer given any management responsibilities; he was not allowed to attend even lower level manager meetings; he reported to a supervisor whose grade level was no higher than his; and he was required to do clerical and data entry tasks. *Kessler v. Westchester County*, 98 FEP Cases 1185 (2nd Cir. 2006).
- T. Denial of request of employee on FMLA leave to return to part-time work was adverse employment action. *Mickelson v. NY Life Ins. Co.*, 98 FEP Cases (10th Cir. 2006).

2. Examples of Non-Adverse Actions.

In the cases discussed below, the courts held that under the facts and circumstances of the actions a reasonable worker would not find the actions to deter protected activity.

- A. Delay in making requested accommodations under the ADA was a minor annoyance, not an adverse action, when the action was nothing more than inherent workings of an educational bureaucracy. *Carmona-Rivera v. Commonwealth*, 18 AD Cases 651 (1st Cir. 2006).
- B. Placement on administrative leave with pay was not adverse employment action. *Joseph v. Leavitt*, 98 FEP Cases 1540 (2nd Cir. 2006). Here employee was placed on paid leave during

investigation into criminal charges of domestic violence and drug use charges. *Joseph v. Leavitt*, 98 FEP Cases 1540 (2nd Cir. 2006).

- C. Failure to transfer to a lateral position is not an adverse action where claim that position is more prestigious and has better advancement opportunities is pure speculation. *Freeman v. Potter*, 99 FEP Cases 246 (6th Cir. 2006)
- D. The transfer may not be retaliatory, if the position the employee was transferred to or sought to be transferred to was identical or for the most part was identical to the original position. For example, in one case the court found that the position to which the employee was denied transfer was "almost identical" because the duties were the same, the pay was not greater, the position was not one of greater prestige and the opportunities for advancement were not greater. The court held that "a reasonable person would not find that the denial of a request to transfer was materially adverse, even though the requested position was indoors where there was heat and air conditioning and the requested position began work earlier in the day than the original position and the position handled customer complaints. *Reis v. Universal City Development Partners, LTD*, 442 F. Supp. 2d 1238 (M.D. FL. 2006) (Arising under the Florida Civil Rights Act, which is construed like the ADA and the FMLA).
- E. Involuntary transfer of employee from Tulsa to Wichita was not adverse employment action, even though relocation 177 miles away was at her own expense, where both positions provided same pay, benefits, and responsibilities, employee had only been in Tulsa position 10 weeks and her transfer to Wichita was back to position she had previously held for five years, relocation did not require her to see or purchase house, and cost of relocating was minimal and known risk. *Vann v. Southwestern Bell*, 98 FEP Cases 314 (10th Cir. 2006).

VII. Practical Pointers

The bottom line for employers is that it is now easier for employees to allege a retaliation claim even if the alleged retaliation has not cost the employee a material term or condition of employment. While an employer cannot completely eliminate the risk of retaliation claims, there are some actions that can reduce the likelihood of those claims. For example:

1. Prohibit Retaliation in Your Written Policies.

Employers must review their anti-discrimination policies and make sure that the policies clearly state that the employer prohibits retaliation against any

employee who raises concerns about discrimination, whether formally or informally, whether within or without the company, and whether or not those concerns are determined to be valid. These revised policies should be published to all employees and acknowledgments of receipt obtained.

2. Training and Education of Managers and Supervisors.

Management should be trained on the specific prohibition of retaliation. The policy should be stringently enforced.

3. Always Have Legitimate Business Reasons for the Action.

Employers should always carefully evaluate the reasons that any action is being taken whether it affects an employee's working condition or not. The action should always be supported by legitimate business reasons.

4. Evaluate Each Action Based Upon the Specific Facts and Circumstances.

Do not assume that because one employee did not claim an action was adverse that another employee will reach the same conclusion. Employers who want to carefully assess the risk before they act should review the facts and circumstances of each specific action before taking it.

5. Documentation of Disciplinary Actions.

Documentation of disciplinary actions is the key to a defense against any claim by an employee that the employer's discipline has been unlawful. This is just as true in defense of a retaliation claim as a discrimination claim. Employers should train managers to keep contemporaneous written records that any employee's misconduct or poor performance has been discussed with the employee.

6. Uniform Application of Policies.

Any action, including disciplinary action, should be reviewed to establish that it is consistent with action taken with other employees in similar situations. An employee who has lodged a complaint should not be the "test case" for the action.

7. Multiple Layers of Review.

Disciplinary decisions and other actions should be reviewed by a higher level of management or the human resources department to ensure uniformity and to check against retaliation or the appearance of retaliation.

8. Funnel All Decisions Through Human Resources.

While this suggestion seems self evident, many employers do not have a check and balance system in place in which all employment decisions must be funneled

through the Human Resources department. This requirement is especially acute if the employee has previously exercised their rights under the employment statutes. The employee may have a new supervisor or the supervisor may have forgotten or is not aware that the employee has filed a charge or assisted in a charge of discrimination. The Human Resources department should be the check to ensure that all employment decisions regarding an employee who has engaged in a protected activity are being made for proper, legitimate and non-discriminatory reasons. The Human Resources department should pay particular attention to decisions involving individuals who have engaged in protected conduct, especially if it appears that such decision is inconsistent with decisions involving similarly situated employees who have not undertaken protected activities.

9. Don't Relax After the Underlying Claim is Resolved.

Employers have a tendency to relax and feel that everything is well once an underlying charge of discrimination, complaint, or workers' compensation claim is resolved. This mistake can be very costly. Employers should continue to monitor all situations with an employee once the original claim has been resolved to ensure that retaliation is not occurring. This may involve periodic communications with and inquiries of the employee to ensure that no retaliation is occurring. Specifically, for a period of time, the employer should follow up with the employee to ensure that no additional problems have developed. In addition, the employer should inform the employee's supervisors to refrain from and watch for any conduct by any co-workers which could be considered intimidation or retaliation against the employee who exercised rights under the employment laws.

10. Passage of Time.

The case law interpreting retaliation provisions tend to mitigate the possibility of a viable retaliation claim if sufficient time is passed between a protected activity and the alleged retaliatory act. While there is no bright line "waiting period" before an employment action can no longer be considered to be connected to or motivated by retaliation, the Courts have ruled that the passage of as little as six months demonstrates that an employee's action is not connected to the employee's prior protected activity, especially if there is some justifiable basis for the termination. Certainly, the longer the period of time between the protected activity and the employment action, the less risk there is in the termination.

In addition, we often find that problem employees, if given time, will find a way to give the employer a justifiable basis for termination. Rather than terminating an employee the second week back from workers' compensation leave for poor performance, the employer may wish to wait the employee out. Employees will often either quit or do something that will unquestionably justify their termination.

On the other hand, if an employee clearly engages in conduct that an employer cannot tolerate, the employer may need to take the risk and terminate the employee immediately. In such case, the employer should thoroughly document the

conduct that resulted in the termination or disciplinary action, and be able to demonstrate why such employment action was necessary.

11. Review of Post-Employment Actions.

Post employment actions, such as challenging unemployment compensation, providing references, bringing criminal charges or pursuing civil action against an employee should be subject to the same scrutiny as other actions taken with regard to an employee to prohibit retaliation. Additionally, the centralized control of these actions, for example in human resources, will go a long way in preventing adverse decisions.

12. Legal Review.

Check with your legal counsel before taking any action against an employee, particularly one that has made or supported a complaint.