

Managing Bulletproof Employees:

Avoiding Retaliation,
Whistleblowing,
and Sarbanes-Oxley Traps

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HR Horror Stories

- “We had a paper trail showing performance problems, but it did not help.”
- “This employee’s incompetence did not matter a bit to the Judge.”
- “We had to settle a case with a problem employee.”

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Easiest Type of Claim --for Employees to Win

- 50% of jurors feel they were discriminated against at work.
 - 53% believe employers will retaliate.
 - 37% agree that, if a complaint is filed, employee usually was wronged.
 - 78% of jurors believe management will lie to win a lawsuit.
 - 61% believe their function is to send messages to companies to improve behavior.
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Why Hard for Employers to Win

- “It’s good public policy.”
- “Inherent believability.”
- Self-fulfilling prophecies.
- Timing favor.
- “Too much of a good thing.”
- Preemptive strikes by employees can give them “halo.”

Sources of Employee Protections

Basic Federal Statutes

- Anti-Retaliation provisions of
 - Title VII of the Civil Rights Act of 1964.
 - Age Discrimination in Employment Act.
 - Americans With Disabilities Act.
- Sarbanes-Oxley.
- National Labor Relations Act.
- Family and Medical Leave Act.

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Basic Federal Statutes

- Occupational Safety and Health Act.
- Fair Labor Standards Act.
- Variety of whistleblowing provisions applicable to specific industries, federal government contractors' employees who report "fraud, waste and abuse."

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Nevada Laws

- Nevada's Anti-Retaliation Statutes.
- Service on Jury.
- Torts—
 - Filing workers compensation claim.
 - Refusal to work in unsafe conditions.
 - Reporting illegal conduct to law enforcement/outside agency.
 - Providing truthful court testimony.

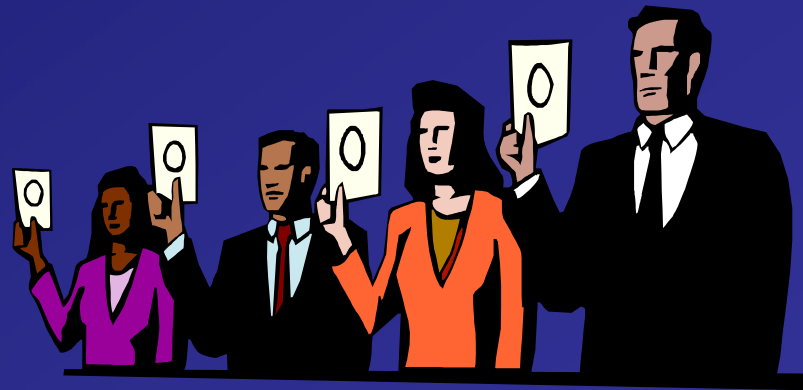
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Government Entities

- Retaliation by public employer for exercise of First Amendment rights to complain about or protest on a “matter of public interest.” (42 U.S.C. 1983)
- Whistleblowing by employees of Nevada state entities.

Increasing Numbers @ EEOC

- 15,853 retaliation charges in 1994, to 22,740 in 2004.
- From 17.4 % to 28.6% of all charges.
- *Total charges filed with EEOC and state FEP agencies have continued their decline.*



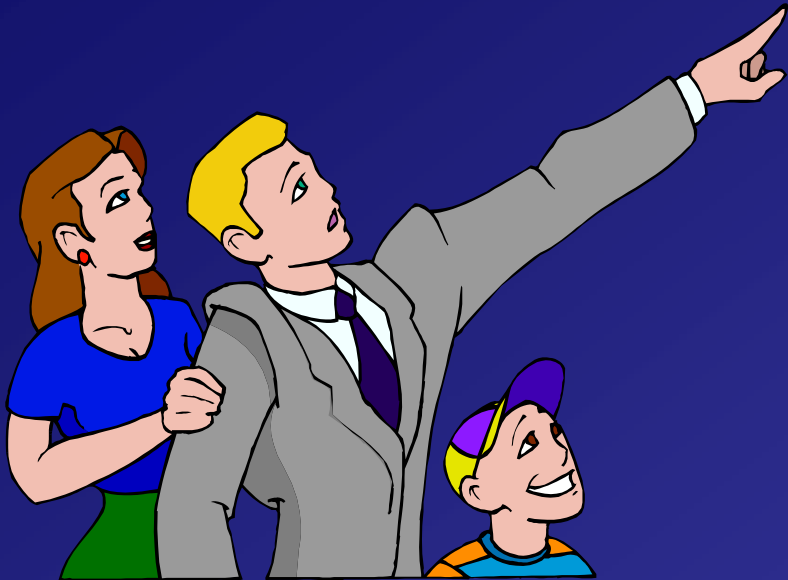
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Elements of a Retaliation Claim

- Employee engaged in “protected conduct.”
- Employer took action against the employee.
- Causal link between protected activity and adverse action.

What Employee Conduct is
“Protected”?

Protected Activity



- Invoked legal rights to do an act supported by law.
- Opposed unlawful conduct.
- Complained about illegal conduct.

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Complaints of Illegal Conduct

- Employee needs only a “reasonable” belief in the existence of violation.
- Whistleblowers do not have to be lawyers or “right.”
- Courts set low threshold.
- Usually, the complaint can be to government agency or within the company or even outside the company.

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Title VII “Protected Activity”

- “Opposition:” complaint about or other opposition to an employment practice made unlawful by the statute.
- “Participation:” Filing charges or lawsuits, or giving evidence in another employee’s case.

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“Opposition Conduct”

- Lower threshold developed to encourage informal opposition and, thus, compliance.
- Does not include charges or lawsuits.
- “Opposed” action does not have to actually *be* illegal.
- Employee’s belief in illegality must be:
 - “objectively reasonable”
 - “in good faith”

“Objectively Reasonable”

- Protest that outside consultant, during a safety briefing, engaged in extraneous discussion of sexual topics (*Trent*).
- Reading sexual remark in the line of duty, followed by chuckle (*Breeden 9th Circuit*).
- Refusal to discriminate in discriminatory treatment of inmates or customers.

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“Mixed Motive” Analysis

- Under Title VII, no need to show the only motivating factor was an unlawful one; must be only substantial motivating factor.
- If mixed motives, employer must prove same decision without improper motive.
- Nevada’s common law retaliatory discharge claim does not employ mixed motive analysis; unlawful motivation must be sole factor.

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Sarbanes-Oxley

Employees of:

- Publicly-traded corporations.
- Subsidiaries.
- Accounting firms.

Can Report:

- SOX violations.
 - Securities and Exchange Comm'n rules/regulations.
 - Fraud against shareholders.
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SOX Protects When Whistle Blown To --

- Federal regulators
- Member or committee of Congress
- Person with supervisory authority over the employee
- Employer's investigator
- Person with authority to terminate misconduct

SOX Complaints

Examples

- Company used contract workers in violation of law.
- Company failed to disclose material oral agreements in SEC filings or disclosures.
- Business plan neither reasonable nor realistic.
- Management used vendor based upon personal relationships.
- Higher commissions paid to sales agents who were personal friends of decision-maker.

Sarbanes-Oxley

Harder Burdens on Companies

- SEC notified of complaint.
- Employee must show protected activity was contributing factor to the personnel action.
- To avoid liability, employer must show by clear and convincing evidence that action would have been taken in absence of protected activity.
- Difficult to obtain summary judgment.
- DOL interim remedies.

What Personnel Actions
Are Impacted?

“Adverse Employment Action”

- Split in the federal circuit courts.
- Employers have little guidance.
- Ninth Circuit applies most liberal standard:
 - any retaliatory action of a nature that would “deter a reasonable employee from complaining about harassment or discrimination.”
- Basic Ninth Circuit test renders almost any employment decision actionable.

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Renders Actionable--

- Lateral transfers.
- Relocation of job site.
- Reduced/changed duties or salary.
- More responsibilities.
- Poor evaluations.
- Retaliatory hostile work environment.
- Denial of raises.
- Refusal to promote.
- Discipline.
- Exclusion from meetings or seminars.
- Termination.
- Bad job references.

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Causal Connection Issue

- Frequently is fact-specific, circumstantial.
- Direct evidence is rare.
- Showing protected conduct is *known* to decision-maker.
- “On the mind” of the decision-maker.
- “Temporal proximity” between protected conduct and adverse action.

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Supreme Court

Breedon v. Clark County School District

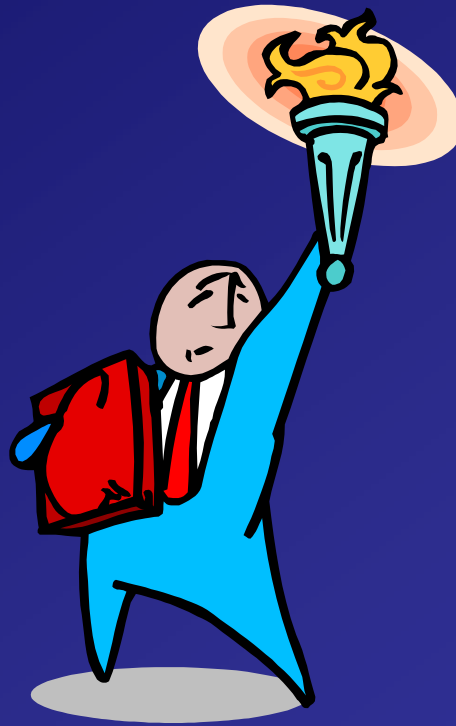
- Decision-maker unaware of lawsuit *at time*.
- Mere temporal proximity will not suffice unless *close*.
- Need not halt planned (but not finalized) action once employee engages in protected conduct -- so long as you can *prove* you had planned to take the action.

Develop Best Practices
to Minimize Potential for
Whistleblower Claims

Cannot Develop &
Implement
After Problem Arises

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Policy & Culture Changes



Policy & Culture Changes

- Written policies prohibiting illegal conduct.
- Written policies encouraging reporting of unlawful or unethical activities.
- Written policy prohibiting retaliation.
- Encourage employees to report problems.
- “Hot-line” for reporting concerns.
- Train managers on legal obligations, where to obtain assistance, and non-retaliation.

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Demonstrate Commitment

- Promptly investigate and address *any* colorable complaints – even if trivial.
- Document investigation and conclusions.
- Respond in writing to complaints with results of investigation.
- Remind all involved of non-retaliation policy.

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Demonstrate Commitment

- Provide complainant with *facts* to show lack of unlawful conduct.
- If illegal, unlawful, or unethical conduct is uncovered, correct it *promptly*.
- Inform complainant of corrective measures.
- Be alert for potential for retaliation.
- Discipline -- usually discharge -- for proved retaliation.

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Use Best Practices in Personnel Management



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Use of Best Practices

- Publish clear written performance standards.
- Review/modify rules of conduct.
- Consistently coach employees who do not do the job or violate the rules of conduct.
- Inform employee of consequences of failure to improve.
- Document the coaching – have employee sign.
- Effective progressive discipline program.
- BE CONSISTENT.

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Avoid Casting Shadows

On Legitimate Decisions

- No discussion of complaint except in order to try to resolve it -- including after resolution.
- Before taking *any* personnel action thereafter, ensure clear consistency with similar situations *and* factual support.
- Advise supervisors that, if in doubt as to whether an action may appear retaliatory, consult Human Resources and/or counsel.

Avoid Casting Shadows

On Legitimate Decisions

- If employee has engaged in protected conduct that impacts the decision-maker,
 - Remove that person from the decision process on any remotely “adverse” action.
 - If the person has to be involved, all such decisions should be carefully reviewed by a third party and/or Human Resources.