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IT COMES DOWN TO FAIRNESS: UNDERSTANDING & PREVENTING RETALIATION CLAIMS

Today's Presenter

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The information presented here is not intended to be legal advice

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Agenda

- Overview of the Law
- Elements of Proof
- Common Forms of Retaliation
- Case Studies
- Best Practices

Why are Retaliation Claims so SCARY?

- They sneak up on employers even when a legitimate reason exists for the employment action
- Numerous statutes prohibit retaliation
- If no applicable statute, common law claims
- Broad coverage
- Liberal interpretation
- Low burden of proof standard for causation
- Runaway juries

A Steady Rise…

- EEOC
- 1998: Only **24%** of Charges
- 2008: **34%** of Charges
- 2018: Almost **52%** of EEOC Charges
  - 76,418 Total Charges in 2018
- Washington
- 2008: **37%** of HRC Charges
- 2018: **54%** of HRC Charges
  - 1,135 Charges in 2018

Statutory Retaliation Claim

Employee must show:

1. The employee took a statutorily protected action,
2. The employee suffered an adverse employment action,
3. A causal link between the employee's protected activity and the adverse employment action, and
4. Damages.

The Universe of Protected Activities

- Worker's compensation
- OSHA/WISHA
- State and Federal Anti-discrimination Laws
- National Labor Relations Act
- Family and Medical Leave Act
- State and Federal Wage/Hour Laws
- Military service
- Affordable Care Act
- Employee Retirement Income Security Act
- Public Employees

Protection Action

- Verbal or written complaints
- Internal or external complaints
- Former and current employees
- Third-party (association) protections
- Nonverbal conduct

Material Adverse Action defined

1) Employer engaged in some adverse action; and
2) The adverse action “might have dissuaded a reasonable worker” from engaging in the protected activity.

Materially Adverse Actions

- Bad performance review
- Disciplinary action
- Shift reassignment
- Job transfer
- Delaying approval for a pay increase
- Temporarily removing an employee from duty and requiring psychiatric evaluation
- Denial of request for office space
- Delaying or withholding paycheck

Causation

- An employee must show that retaliation was a substantial factor motivating the adverse employment decision.
- Retaliatory motive doesn't have to be the sole or principal reason for the adverse action.
- Proximity between protected activity and adverse action = excellent circumstantial evidence.

Damages and Remedies

- Compensatory
  - Emotional Distress
  - Lost wages and benefits
- Punitive
- Reinstatement

Defending a Retaliation Claim

The best way to defeat retaliation claims is to prove:

1) There was no adverse action;
2) If there was an adverse action, it wasn't material;
3) No knowledge (or suspicion) of protected activity;
4) The adverse employment decision was made *before* we knew about protected activity; or
5) There is a legitimate business reason for the adverse action that *has nothing to do with your protected activity*.

Washington's Industrial Insurance Act

RCW 51.48.025

"No employer may discharge or *in any manner discriminate against* any employee *because* such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title."

Elements of Claim

1) Employee filed industrial insurance claim,
2) Employer thereafter discriminated against employee in some way, and
3) Industrial insurance claim and the employer's discrimination were causally connected.

RCW 51.48 - Low Burden of Proof

Under Washington law:

The employee is not required to prove employer has a policy or practice of retaliation against employees who exercise their rights under industrial insurance law, or that she was directly threatened with retaliation for claiming benefits for a work-related injury.

Wrongful Discharge in Violation of Public Policy

Elements:

1) Existence of a clear public policy,
2) Discouraging the conduct in which EE engaged would jeopardize the public policy,
3) EE dismissed because of the public-policy-linked conduct, and
4) Employer has not offered overriding justification for dismissal.

Wrongful Discharge in Violation of Public Policy

- Four established categories of conduct
- Employee is fired for:
  1) Refusing to commit and illegal act,
  2) Performing a public duty,
  3) Exercising a legal right or privilege,
  4) Reporting employer misconduct.

Robel v. Roundup Corp., 148 Wn.2d 35 (2002)

- July 1996 – Linda slip and fall, files WC claim, returns to light duty
- August 1996
  - Coworkers mock and embarrass her
  - Manager Amy engages in the so-called fun
  - Company holds meeting to warn everyone to knock it off
- September 1996 – Linda gives work release to supervisor, overhears manager tell coworkers, “Can you believe it, Linda’s gonna sit on her big ass and get paid.”

Robel v. Roundup Corp., 148 Wn.2d 35 (2002)

- September 1996 - one coworker finally gets fired.
- Linda never returns to work.
- Instead files disability discrimination and retaliation claims against Fred Meyer.

Robel v. Roundup Corp., 148 Wn.2d 35 (2002)

- WLAD supports disability-based hostile work environment claim and evidence supports it.
- Evidence supports retaliation claim.
- Adverse treatment attributable to the action/inaction of management.
- Discharge not required.
- Fred Meyer is responsible for the conduct of its employees, including intentional infliction of emotional distress.
- Constructive discharge? Violation of public policy?

Cornwell v. Microsoft Corp., 192 Wn.2d 403 (2018)

- Dawn was a long-term Microsoft employee.
- Dawn made a claim against Supervisor Todd for sex discrimination and retaliation.
- Confidential settlement agreement; Dawn won't be required to report to Todd.
- 7 years later, Supervisor Mary asks Dawn to mentor employee who reports to Todd.
- Dawn tells Todd no because she filed a lawsuit against Microsoft and can't report to him.

Cornwell v. Microsoft Corp., 192 Wn.2d 403 (2018)

- Shortly thereafter, Mary gives Dawn lowest possible score on performance review (other managers disagree and Dawn has a long positive employment/eval history).
- And THEN, Dawn is laid off in a reduction-in-force due to review score rating.
- Reapplies, and told ineligible due to performance rating.

Cornwell v. Microsoft Corp., 192 Wn.2d 403 (2018)

- Dawn sues for retaliation under WLAD.
- Judgment for Microsoft because there is no evidence Mary "knew" there was a previous complaint under WLAD, so no causation.

Cornwell v. Microsoft Corp., 192 Wn.2d 403 (2018)

- Summary judgment reversed, case allowed to proceed to trial.
- WLAD prohibits discrimination and retaliation against employees who oppose discriminatory practices.
- No actual knowledge that employee engaged in protected activity required.
- "Knew or suspected" standard furthers the WLAD's purpose to protect employees from retaliation.

Cornwell v. Microsoft Corp., 192 Wn.2d 403 (2018)

"The purpose behind the 'knew or suspected' test is to protect employees from retaliation to the fullest extent possible. It seems clear that an employer that retaliates against an employee because of the employer's suspicion or belief that the employee filed a complaint has as surely committed a violation of the statute as an employer that fires an employee because the employer knows that the employee filed a complaint. Such construction most definitely furthers the purposes of the statute generally and the anti-retaliation provision specifically."

Ross v. Fred Meyer Stores, Inc., (W.D. Wash. 2010)

(What is it with Fred Meyer?)

- October 2007 – Paul hired as a "picker."
- June 2008 – Scheduled review of probationary performance based on time standards, performance, attendance, attitude, general conduct.
- Prior to review, Grocery Dept Mgr decided not to retain Paul due to performance, attendance and attitude; other dept supervisors were asked to provide recommendations and agreed.
- May 2008 – Paul reported on-the-job injury that occurred in late April.

Ross v. Fred Meyer Stores, Inc., (W.D. Wash. 2010)

- Claim accepted and Paul goes on leave for treatment, gets time-loss.
- February 2009 – Paul returned to work and was immediately terminated for unsatisfactory performance.
- Paul sues, claiming disability discrimination (WLAD), retaliation, and wrongful discharge in violation of public policy.
- Dismissed!

Ross v. Fred Meyer Stores, Inc., (W.D. Wash. 2010)

- To prove disability discrimination, employee must prove: (1) he is disabled; (2) he was discharged; (3) he was doing satisfactory work; and (4) similarly situated persons without a disability were not terminated.
- Paul couldn't prove that he was performing to expectations.
- He basically needed to prove that the company is lying about its reason for firing him ("pretext").
- "…coincidence is not proof of causation."

Insulate Yourself

- Anti-retaliation policy with complaint resolution process
- Consistent application of policies/expectations
- Promptly address performance/attendance issues
- Clear notice and opportunity to cure
- Disclose protected activity on need-to-know basis
- Prompt, effective response to retaliation complaint
- Intervening favorable employment action
- Same-actor defense – maybe
- TRAINING

I REPEAT:

The best way to defeat retaliation claims is to prove:

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DOCUMENTATION!

- Establishes legitimate business reason for action.
- Investigation?
- Internally and externally consistent.
- Objective – just the facts.
- NO mention of protected activity.
- Who made the decision?
- WHEN was the decision made?

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