



Why
**Retaliation Claims
are on the Rise**
and
What Employers Can Do About It

By Robert M. Shea
and Mark H. Burak



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1601 Trapelo Road, Suite 205
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The hottest type of employment discrimination claim is not one based on race, or sex, or disability, or even age. Rather, it is one alleging that the claimant was treated differently for exercising rights under one or more of the various discrimination statutes. These claims of “unlawful retaliation” are increasingly popular. According to EEOC data, retaliation claims have increased by approximately 100% during the period 1992-2006! Indeed, retaliation claims now comprise 30% of the total charges filed. This brief article is intended to assist in-house counsel, human resource executives and business executives gain an understanding of why these claims are on the rise, the components of a retaliation claim, and to offer employers suggestions on how to avoid such claims.



Why the increase in retaliation claims?

Why the dramatic increase in retaliation claims? Are employers suddenly becoming more vindictive? Hopefully not. Instead, it seems claimants and their attorneys have come to realize that retaliation claims are different than typical discrimination claims and that retaliation claimants, in general, are more likely to prevail at trial and recover significant damages. Simply put, juries

more receptive to retaliation claims than typical discrimination claims.

Moreover, the Supreme Court’s recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), has significantly lowered the standard claimants must prove to win a retaliation claim. Essentially, the Court has adopted a lower standard of harm the claimant must establish to prove he or she was subject to retaliation. Instead of requiring a showing that the employer engaged in conduct that materially adversely affected the employee in the terms or conditions of employment, the Court adopted a much looser and vaguer standard. Now, at least for purposes of Title VII, “adverse action” is any action by an employer that “well might have dissuaded a

reasonable worker from making or supporting a charge of discrimination.” Because this lower standard will likely result in even more claims, it is critical that employers understand why these claims have been increasing over the years.

Why retaliation cases are different

What makes retaliation cases different? It may be a function of human nature and how jurors think people react when they are accused of wrongdoing. Think about it. If a subordinate went to your superior, to the human resources department and/or to a government agency (such as the EEOC) and accused you of discrimination or sexual harassment, would you find it difficult to treat that employee as if nothing has happened? Of course you would, but that is essentially what the law requires. As one commentator put it, “[a]nti-retaliation laws require almost superhuman restraint.” And juries know that managers and supervisors are all too human, and that it is only natural for humans to want to strike back at people who attack them and accuse them of wrongdoing.

Jury research shows that jurors are predisposed to disbelieve employers. This predisposition has probably become stronger in recent years given the rash of well-publicized corporate misdeeds (Enron, WorldCom, Adelphia, etc.). Still, in many employment discrimination cases plaintiffs face an uphill battle persuading jurors that the particular manager involved in the employment decision acted as the result of some bias against the plaintiff’s race, sex, age, etc. In retaliation cases, on

the other hand, jurors appear more willing to accept the plaintiff’s claim that his/her manager treated the plaintiff differently after the plaintiff accused the manager of discrimination or harassment. In other words, it is easier for jurors to conclude that a manager followed his/her natural impulse to strike back than it is for jurors to conclude that a manager acted based on some invidious intent to discriminate against a particular protected class of people. This helps explain the growing number of cases in which plaintiffs have failed on their underlying discrimination claims yet prevailed on their retaliation claims.

The fact that jurors may view as natural the desire to strike back at disloyal and troublesome employees, however, has not deterred jurors from punishing those employers whose managers have succumbed to basic human nature. Successful retaliation claimants are routinely awarded punitive damages, in many cases exceeding \$1 million. The bottom line here is that jurors hold employers accountable when they fail to protect employees from unlawful retaliation.

All is not lost for employers defending retaliation claims

But all is not lost for employers in this area. With the rise in retaliation claims being filed is an increasing recognition by courts that the “retaliation card” is being overplayed by some employees. One court described the problem this way:

[T]he possibility of a retaliation claim creates the problem of conferring a de facto immu-

nity on the complainant despite poor job performance or the meritlessness of any complaint. Consider a hypothetical of a ne’er do well employee who wants to manipulate the system to his or her advantage: “Not doing your job well? Ax about to fall? Never fear: file a discrimination claim, no matter how meritless. Your employer will be afraid to take any action because now you can sue for retaliation.”

Chen v. County of Orange, 96 Cal. App. 4th 926, 948 (Cal. Ct. App. 2002). The U.S. Supreme Court’s decision in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) should also give some comfort to employers who fear that an employee who files a discrimination or harassment claim is now immune from discipline. The Court said that employers “need not suspend previously planned [employment actions] upon discovering that a [discrimination] suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatsoever of causality.” *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001) The trick, of course, is for the employer to be able to establish that the employment action at issue was “previously contemplated,” and here well-documented prior performance problems and/or warnings are often key.

Still, employers must recognize that employer retaliation against protected employee conduct is unlawful, and for good reason. The law requires that employees have recourse

to complain of unlawful employer conduct without fear of retribution. The difficult challenge for the courts is in striking a balance between, on the one hand, the potential chilling effect employers' retaliatory actions can have on valid employee complaints and, on the other hand, the concern that law-abiding employers are being paralyzed into inaction because of employee complaints.

The elements of a retaliation claim

To prove unlawful retaliation an employee must generally establish that (1) he/she engaged in a protected activity, (2) the employer took some adverse employment action against him/her, and (3) a causal connection existed between the protected activity and the adverse employment action. Thus, in defending retaliation claims, employers usually try to demonstrate that one or more of these three elements are missing.

To establish he or she engaged in protected activity, an employee must show he or she (a) participated in an activity protected by the employment statute (e.g., filed a charge, testified, assisted or participated in an investigation, proceeding or hearing) or (b) opposed an unlawful employment practice prohibited by the statute. Protected "opposition" may include, among other things, making complaints to management, protesting against discrimination in general, and expressing support of co-workers who have filed charges of discrimination or harassment.

Determining whether an employee's opposition to an employment practice is protected activity can be tricky because an employee

need not establish the conduct he or she opposed was in fact discriminatory; rather, he or she must only demonstrate a "good faith, reasonable belief" that the underlying conduct violated the law. Employers need not tolerate bad behavior, however. Increasingly, courts are holding that employees must conduct themselves "reasonably" in opposing an alleged unlawful employment practice and may not disrupt the workplace (e.g., slapping the alleged offending employee is not protected). And even the EEOC maintains that "opposition to perceived discrimination does not serve as a license for [an] employee to neglect job duties."

Under Massachusetts law as it stands currently, the employee must show that he or she experienced a materially adverse change in employment conditions.

To establish he or she was subjected to an adverse employment action, under the recent *Burlington Northern* case an employee must show only that the employer engaged in conduct that "might well have persuaded a reasonable employee from making or supporting a charge of discrimination." Although the harm at issue cannot be "trivial", it is not clear when the conduct is sufficient to "dissuade a reasonable employee" from engaging in protected activity. As a consequence, we

can expect a significant amount of litigation will involve whether the employer's conduct was sufficiently severe to constitute an adverse employment action.

Under Massachusetts law as it stands currently, the employee must show that he or she experienced a materially adverse change in employment conditions. While most courts do not limit this to actions such as discharges, demotions and reductions in pay, employees are generally required to show they suffered some tangible and material employment action. See *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 662 (1996).

To establish a causal connection existed between the protected activity and the adverse employment action, the employee must show that the employer actually knew of the employee's protected activity at the time it took the adverse employment action. The closer the "temporal proximity" between employer knowledge and the employment action, the more likely a court will infer causation. However, even close proximity may not be sufficient to establish causation, particularly where other evidence suggests the contrary.

Take preventative measures now and they will pay off later

With retaliation claims, an ounce of prevention is worth a pound of cure. There are many steps employers can and should take to reduce the risk of retaliation claims and make the claims that are made much easier to defend. Employers should start with a non-retaliation policy. Employers should already

have anti-discrimination and harassment policies. If these policies do not address retaliation, then employers should amend their current anti-discrimination and harassment policies to include a non-retaliation statement that encourages employees to come forward with complaints of unlawful conduct without fear of reprisal. Indeed, Massachusetts law requires that sexual harassment policies state that retaliation is unlawful. Rather than rely solely on an anti-harassment policy, employers should seriously consider adopting stand-alone non-retaliation policies setting out the employers' prohibition against retaliation and the procedure for redress. This shows that the employers takes their non-retaliation obligations very seriously, and can also be good evidence where an employee later claims retaliation before a court or agency without having used the employer's procedure for redress.

Like a harassment policy, a non-retaliation policy will only go so far, however, unless managers and supervisors understand what it means and how it should be applied. Accordingly, employers should provide training on what constitutes retaliation and how to respond when a complaint is brought to their attention and this training should be documented so that later the employer can show the steps it took to prevent unlawful retaliation.

Employers also should provide claim-specific training/counseling. In other words, when an employee makes a claim of discrimination, harassment or other unlawful conduct, the managers, supervisors and, where appropriate, co-workers who

work with the claimant should be counseled concerning their non-retaliation obligations. This counseling should be documented, again to enable the employer later to show that it took all appropriate steps to protect claimants from retaliation.

Claimants should not be ignored or treated as pariahs. Instead, they should be contacted by management and offered support. The employer, usually through human resources,

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should explain its policy against retaliation and the procedure for redress. The employer should provide the claimant with a copy of the policy and offer to assist should the claimant experience problems. The discussion should be documented in a memo to the claimant. Employers should not believe, however, that one meeting is enough. In most cases it is advisable that the employer follows up with the employee and asks whether there have been any incidents or other problems.

In some situations the employer should also consider restructuring the environment, perhaps allowing

the claimant to report to a different supervisor, changing performance evaluators, implementing alternative work schedules, or even permitting telecommuting, so as to reduce, if not eliminate, the risk of retaliation. However, employers should be careful to ensure that these changes do not appear to be retaliatory. In such situations the employer should have the employee "sign-off" on the change to document the employee's agreement with the change and to eliminate (or, at least, reduce) the risk that the employee will later claim that the workplace restructuring itself was an act of retaliation.

Accommodating a claimant can be a bitter pill to swallow, particularly where it is believed that the employee's claim has no merit and is possibly being asserted for the sake of the employee's own job protection. Although dealing with a still-employed claimant takes patience, restraint and tough-mindedness, employers can be comforted knowing that the false sense of "immunity" the employee may feel after making his claim may sooner or later lead to serious performance mistakes or misconduct, and provide clear-cut grounds for discharge.

Finally, adverse actions against a claimant should be reviewed before they are taken. Human resources, legal counsel or other appropriate management personnel should review any proposed employment actions affecting a claimant to ensure that unlawful retaliation is playing no role in the action. The reviewers should ask: Is the proposed action consistent with the employer's actual practice when presented with similar performance deficiencies or

misconduct? Is the proposed action supported by appropriate documentation? Is the claimant now being criticized or disciplined for performance or conduct that the employer deemed acceptable or tolerated prior to the claim? Would an unbiased

observer think the action was reasonable? Would the employer's "best employee" be treated the same way? A cool-headed review of the situation before any action is taken may save the employer (as well as the individual managers and supervisors

involved) the misery of protracted litigation and the very real risk of significant money damages.

Conclusion

Retaliation claims are the fastest growing and most dangerous type of claims under the discrimination laws, largely because they allege conduct that is consistent with human nature to strike back at those who cause trouble and do harm. However, by exercising caution when dealing with still-employed claimants and taking appropriate steps to eliminate the potential for retaliatory conduct, employers can effectively reduce the risk of lawsuits and damages.

About the Authors

Mark H. Burak
mburak@mbbp.com
781-622-5930



An AV-rated employment lawyer, Mark represents employers before administrative agencies and in state and federal courts in defense of sexual harass-

ment, discrimination, wrongful termination, wage-hour, ERISA disputes, and other employment-related claims, and in the litigation of non-compete and trade secret matters.

Mark advises employers in all aspects of employment law with a focus on implementing preventive employment practices. He counsels employers in areas of sexual harassment, supervisory skills, EEO training, employment and human resource policy development, employee discipline and terminations, severance, privacy issues, leave, disability and family medical leave, wage-hour and other employment issues, as well as transactional related matters. His clients span a number of industries including software and high-tech, construction, retail, health care, manufacturing, and professional employer organizations.

Learn more at: mbbp.com.

Robert M. Shea
rshea@mbbp.com
781-622-5930



Bob counsels businesses and individuals in all areas of employment and labor law, including employment policies and practices, employment

and independent contractor agreements, employee handbooks, discipline and discharge, harassment, wage-hour, leaves of absence, workplace privacy, drug-testing, non-competition, reductions-in-force, and separation agreements.

An AV-rated employment lawyer, he regularly represents clients before federal and state courts and agencies in cases involving claims of employment discrimination, harassment, retaliation, wrongful discharge, ERISA issues, breach of employment/non-competition agreements, and wage-hour violations.

Bob also counsels and represents clients in alternative dispute resolution, including mediation and arbitration. His practice includes serving as a neutral in employment disputes, and he is trained as both a mediator and an arbitrator. He has served on the American Arbitration Association's Panel of Employment Arbitrators since 1995.

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