

AAPA Port Administration and Legal Issues Seminar

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Current Trends HR and Employment Law

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Brief Review: What we already know...

- Written policy and practice prohibiting discrimination based on:
 - Race (or color)
 - Sex (including pregnancy)
 - National Origin
 - Age
 - Religion (includes minimal affirmative duty to accommodate religious practices)
 - Disability (includes affirmative duty to make reasonable accommodations to known disabilities if necessary to permit employee to perform essential job functions)

Brief Review: What we already know...

- Policy and practice must reflect that discrimination can take many forms:
 - adverse employment actions; or
 - harassment/hostile work environment:
 - Comments, behaviors, or materials that a reasonable person might find offensive or objectionable because of race, sex, color, national origin, age, disability, religion
 - Context-specific: stay well away from “the line”
 - Organizational standard is higher than what law requires

Brief Review: What we already know...

- Policy must contain complaint mechanism
 - For employees who believe they have been subjected to discrimination or witnessed discrimination
 - Multiple avenues of relief (manager, HR leader, higher executive)
 - Toll free number
 - Reporting violations is mandatory
 - Mandatory for managers to pass complaints up the chain
 - Unit assigned the responsibility to investigate complaint, interview all witnesses/victims/accused wrongdoer, and take appropriate action

Brief Review: What we already know...

- Training and Acknowledgment
 - Copy of written policy must be provided to employee
 - Obtain employee-signed written acknowledgement of having received and reviewed policy (language)
 - Conduct periodic compulsory training sessions for all employees (managers, non-managers)
 - Obtain written acknowledgement of employee's having attended training session and copy of "class roll" for session
 - Keep copies of all written acknowledgments/rolls in employee's personnel file

Retaliation

- The Basics: What is retaliation?
 - Where an employee has engaged in “protected activity”
 - Participation: Employee participated in making a complaint of unlawful activity (such as discrimination) against an employer; or has assisted, testified, or provided information in an investigation of such a complaint; or
 - Opposition: Opposed some unlawful activity by an employer
 - Employer cannot discriminate against the employee because of that protected activity

Virtually every law governing the workplace contains an anti-retaliation clause...

- Title VII of the Civil Rights Act – race, color, sex, national origin, religious discrimination
- Age Discrimination in Employment Act (the ADEA) – age discrimination
- Americans with Disabilities Act (the ADA)
- Rehabilitation Act –disability discrimination by federal contractors and grantees
- International Safe Container Act
- Sarbanes Oxley Act (SOX)
- Employee Retirement Income Security Act (ERISA) – pension and welfare benefit plans
- 42 U.S.C. §§ 1981, 1983, 1985 – civil rights violations, conspiracy
- Fair Labor Standards Act (the FLSA) – minimum wage and overtime pay
- Family and Medical Leave act (the FMLA)
- Occupational Safety and Health Act (OSHA)
- Equal Pay Act (the EPA)
- Longshoreman's and Harbor Worker's Compensation Act
- National Labor Relations Act
- Labor Management Relations Act
- Various states' workers' compensation laws

And there are various stand-alone “whistleblower” laws prohibiting retaliation...

- Federal Whistleblower Protection Act
- State laws, *e.g.*:
 - Florida Public-sector “Whistle-blower’s Act”
 - Florida Private-sector “Whistle-blower’s Act”

Retaliation Claims: more common, more dangerous

- More retaliation claims being filed – 22,555 before EEOC in 2006 – near all-time high of 22,768 (2002)
- More retaliation claims surviving summary judgment
- 30% of EEOC filings in 2006 featured retaliation claims – all-time high

Anti-retaliation provisions are not new. Why all the rage now?

- Progression of court decisions have made retaliation cases easier to prove.
- Employees (and Plaintiff's lawyers) are taking notice.
- Amounts of judgments, settlements are up.
- Juries assume that employer has a motivation to get back at an employee who makes a complaint that would harm the employer – especially when the employer feels the complaint is meritless

Retaliation Claims: Then and Now

Before

- “Add on” to an underlying claim of discrimination
- As the discrimination claim went, so went the retaliation claim
- Side dish

Now

- Retaliation claim in its own right
- Retaliation claim survives summary judgment, when underlying discrimination claim dismissed
- Main dish

Burlington Northern & Santa Fe Rwy. Co. v. White
126 S. Ct. 2405 (June 22, 2006)

- Where employer takes some action against a worker who has complained about discrimination, how serious does the action have to be before the worker can make out a claim of retaliation?
- A female “maintenance of way” worker for the railroad makes a complaint of sex discrimination to her manager. Later, she is reassigned from forklift duty to track duty (both are part of her job description). In a separate incident, she is found to have engaged in insubordination and is suspended without pay for 37 days. Her grievance challenging the suspension is upheld, and she eventually receives back pay for the 37 days.

Burlington Northern & Santa Fe Rwy. Co. v. White
126 S. Ct. 2405 (June 22, 2006)

- Before this case, there was disagreement in the courts.
- Most courts applied same standard of what is “actionable” to retaliation cases as they did to discrimination cases:
 - had to be a tangible, adverse employment action
 - an ultimate employment decision such as termination, refusal to hire, demotion, decrease in pay, reassignment to inferior position, etc.

Burlington Northern & Santa Fe Rwy. Co. v. White
126 S. Ct. 2405 (June 22, 2006)

- Supreme Court: standard to prove retaliation is **lower** than to prove discrimination
- “Reasonable employee” would have found the challenged action “materially adverse” – *i.e.*, it “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”
- Open question: this is a Title VII case – what will standard be under other statutes?

How to protect against retaliation claims

- Integrate anti-retaliation concept into workplace respect policies and procedures, and into training sessions with employees and managers
- Make sure all workplace complaints are processed properly
 - Passed up the appropriate reporting chain, no exceptions
 - Who is told about the complaint? “need to know”; obtain and maintain confidentiality
 - Investigate
 - Take appropriate action
 - Notify complainant that complaint taken seriously, investigated, appropriate action taken (do not specify)

How to protect against retaliation claims

- Maintain adequate performance and disciplinary documentation before, during, after complaint is made.
- If you wait until employee makes a complaint, and only then scrutinize their work conduct and productivity, it will always look like retaliation
- Understand that performance management or disciplinary correction of employee who has made a complaint is high-risk
 - Stop
 - Look at pre-complaint pattern of conduct and what was done (or not done)
 - How have non-complaining employees been treated in similar circumstances?
 - Seek advice
- Don't put employee in "glass box" – training lunches example

How to protect against retaliation claims

- Not a shield – but it is an occasion for caution and a measured approach
- Would this be happening if person had not made a complaint?

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