

Avoiding Retaliation Claims



Colleen Trembl
- Office of General Counsel



Greta's Grievance

- Greta works as an assistant in Bob's department. Bob is concerned that Greta is not performing her work satisfactorily, including consistently spelling his name and the University's name wrong on all his correspondence. He has mentioned it to her, but has not discussed it in detail because he has decided to give her one more chance.
- Greta goes to Employee Relations and says that Bob is discriminating against her because of her national origin, and that Bob is sexually harassing her.
- The next week, after she misspells the University's name in a letter to a foundation, Bob is prepared to give Greta a poor performance review and a written warning.

What should Bob do?



Carl's Concerns

- Carl is a file clerk in Sue's department. Carl likes to bring issues to Sue's attention to try to improve the area. Today, he has indicated to her that the boxes in the office pose tripping hazards, that the sharp staples pose a puncture risk, and that the water in the water cooler looks a little brown. He also says that he has noticed that older workers get small offices with poor lighting.
- Sue decides that the area needs to be reorganized to be more efficient, and Sue thinks Carl's hours should change from 8:30 A.M. to 5:00 P.M. to 1:00 to 8:30 P.M. She wants to do this tomorrow.

What should Sue do ?



Why is Retaliation A Big Deal?

- The Equal Employment Opportunity Commission received 32,390 retaliation charges in 2008, the highest number ever. In 2007, retaliation charges were up 18% from the prior year and double 2002 retaliation claims.
- This is the second highest category for EEOC charges next to race discrimination – higher than sexual harassment, gender, age, disability and religious discrimination claims.
- The court cases are much more favorable to finding retaliation for an employee.
- Recent retaliation cases have resulted in big claims against employers and supervisors.



Some Examples

- A jury issued a \$1 Million verdict against Lake Ridge Academy in Cleveland in 2008 and in favor of a male employee who voiced concern about unequal pay for women and believed he was unlawfully fired in retaliation for the complaint.
- Vanguard agreed to pay \$500,000, as part of an EEOC Consent Degree, to an Engineer who received unfavorable work conditions and assignments after complaining about race discrimination.



Retaliation Stands on Its Own

- For Retaliation to be found, there doesn't have to be any evidence of any wrongdoing on the underlying complaint.
- An employer can be responsible for retaliation even if there was no discrimination, sexual harassment or other unlawful conduct.



Retaliation Law

- Title VII – makes it unlawful to discriminate against an employee because he/she has opposed any unlawful employment practice, or made any charge, testified or participated in an investigation of an unlawful practice.
- Also, non-retaliation provisions exist in many other laws or courts have extended it to these – workplace safety (OSHA); age (ADEA); disability (ADA); family/medical leave (FMLA); worker's compensation claims etc.



Latest Law

■ Burlington Case: 2006 – Employer retaliates if actions are

- 1) **materially adverse** to employee and
- 2) dissuade a reasonable worker from making/supporting a charge

So, no longer have to fire/suspend the employee. Any materially adverse action counts.

i.e. schedule change for employee who needs certain schedule

i.e. supervisor does not invite subordinate to conference if conference is important training

■ Key issue: Time between complaint and employer's actions



More New Cases

- CBOCS (Cracker Barrel) Case – 2008 – Retaliation applies when the employee is complaining about the employer's treatment of someone else and under a different federal statute (Section 1981).
- Crawford Case: 2009 – U.S. Supreme Court finds that retaliation claim applies when an employee raises an issue when answering questions during an employer's internal investigation (vs. speaking out on own).



What Can Supervisors Do?



- When an employee brings a complaint or concern to you, accept it willingly and do not become upset.
- Thank the employee for bringing the issue to you. The University has grievance processes because we want to learn what may be wrong so we can fix it.
- Refer the issue to the right office to review i.e. EEO (IDEO), Employee Relations etc., or document the complaint and what you did about it.



What Can Supervisors Do Before Taking Any Action?

- Remember that retaliation relates to any kind of supervisor action that could be materially adverse to the employee i.e. switching job duties, changing schedule, giving performance reviews etc.
- Consider whether the employee has raised a complaint or concern with you or another University office about an unlawful employment practice such as discrimination, unequal pay etc.
- If so, think about whether the action you wish to take would be materially adverse for this employee.



What Can Supervisors Do

Before Taking Any Action?

- Think about the reason for the action you wish to take, and be sure it is not related to any complaint filed i.e You consider the person a trouble-maker.
- Review whether there is information to show that the reason the action is being taken is unrelated to any complaint that the employee has raised.
- Consider whether you have documented the issue or the need for reorganization prior to the employee raising the complaint.
- Document performance issues at the time they arise and address them with the employee i.e. reviews
- Talk to Employee Relations or EEO/IDEO.

What Can Supervisors Do Before Taking Any Action?



- Consider the timing of the action you wish to take in relation to the complaint that has been filed.
- Could a different action be taken to address the issue or could the action happen over more time or at a later date?
- If the action must happen now, do you have information to show that the action was planned or addressed before any complaint was filed?



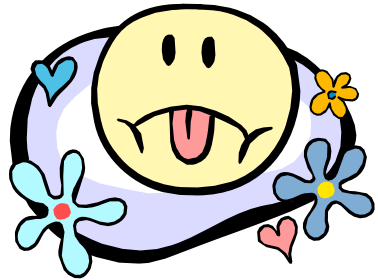
University Policies

- The University has a policy (issued in 2008) on Non-Retaliation/Protection for Whistleblower.
- It encourages employees to report any illegal, dishonest, discriminatory or fraudulent activity to his/her supervisor, Employee Relations or the Integrity Hotline.
- If the employee is not comfortable in going to his/her supervisor, the employee can go to another named office i.e. Employee Relations, EEO/IDEO etc.
- Supervisors must contact the EEO/IDEO office about any report of discrimination and Employee Relations about other reports of illegal, fraudulent or dishonest actions.



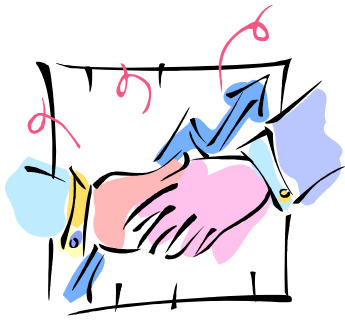
University Policies

- The policy prohibits retaliation or harassment against any person reporting a concern. Retaliation includes termination, compensation reduction, poor work assignments, or threats of physical or mental harm.
- A person who retaliates against a reporter will be subject to corrective action, up to termination.
- Employees who feel they have been retaliated against are to contact Employee Relations or the Integrity Hotline immediately.



University Policies

- An employee does need to file a complaint in good faith.
- Employees must use sound judgment to avoid making baseless allegations.
- An employee who intentionally makes a false report may be subject to corrective action up to termination.



Grievance Process

- Employees also can file a grievance about discrimination or another violation of a specific Human Resources policy.
- Employees who wish to file a grievance should be referred to the EEO/IDEO or Employee Relations Office.
- Employee Relations and/or the EEO/IDEO office will consult with the employee and investigate the grievance.



Greta's Grievance

- Greta seems to have legitimate performance issues.
- Bob should have addressed issues when they arose.
- Once Greta goes to complain about discrimination and sexual harassment, she has a potential retaliation claim for any action taken.
- A poor performance review and written warning would be materially adverse actions.
- What documentation does Bob have about the issues? His action may have to wait until the complaint is investigated.



Carl's Concerns

- Carl's general concerns may create a retaliation claim under OSHA.
- Carl's concern about treatment of older workers would create a potential retaliation claim. It is enough that supervisor received this informal complaint (vs. receiving an official grievance).
- Change in work schedule could be materially adverse.
- Timing of change is likely to be an issue.
- What documentation exists as to the need for the change and when it was first considered?



Questions?

- If you have any questions, please contact
 - Employee Relations at 368-2268,
 - Inclusion, Diversity and Equal Opportunity at 368-8877, or
 - Office of General Counsel at 368-4286.

THANK YOU FOR COMING!