

LEGALEASE



“Simplifying Legal Issues”

Case Western Reserve University - Office of General Counsel

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Avoiding Retaliation Claims

If you are a supervisor, consider this -

Your employee, Bob, is not performing well on the job and you have discussed the performance issues with Bob on a number of occasions. Bob complains to a university office that you are not treating him well or are discriminating against him. You then decide you must terminate Bob for poor performance.

To the supervisor, this action may seem like the necessary and reasonable action. To Bob, it could be viewed as the basis for a retaliation claim. Most supervisors might not realize that taking action related to an employee who has raised a complaint can be perceived as unlawful retaliation, but under several recent U.S. Supreme Court decisions, it can.

Generally, retaliation claims arise when an employee receives an adverse employment action, such as termination, after raising a complaint alleging some form of discrimination, such as

race, age, sex or disability discrimination. Retaliation claims can arise when an employer takes an employment action concerning an employee after the employee has filed any of the following: an internal grievance, a lawsuit in court, or a charge of discrimination with an administrative agency such as the Equal Employment Opportunity Commission.

In recent years, the Supreme Court has expanded the ability of employees to file retaliation claims. The Court has ruled that employees can bring retaliation claims under several different statutes, including race and age discrimination statutes. It also has ruled that retaliation can occur not only when an employee is terminated or demoted, but also when the employee has a change in job duties, change in hours, or other change that is materially adverse or could dissuade a reasonable worker from filing a complaint. Materially adverse actions for a retaliation claim can include:

- Reassigning the employee to a less desirable position
- Giving the employee more physically

demanding assignments

- Reducing an employee's salary
- Suspending an employee without pay
- Altering an employee's schedule if important to a reasonable employee
- Failing to include an employee in activities of the department such as employee trainings

Although a supervisor can take appropriate employment action concerning an employee who has raised a complaint, the supervisor should do so with care. The supervisor should be able to document why the employment action is justified and reasonable and why the employment action is not motivated by the fact that the employee filed a complaint or by another discriminatory reason.

To avoid possible retaliation issues, it is important to remember these things:

- The university has grievance policies for

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ASK THE BARRISTER

Q: I have a hard-working non-exempt employee who occasionally works an additional 30 minutes after the end of the day just to make sure she is caught up with all of her work. She does this even though she knows I cannot pay for overtime because of our budget restrictions - - Is this okay?

Answer on Page 2

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Privilege: A legal tool to protect information

Information control becomes a matter of utmost concern when a court case is pending. Much of this concern centers around the legal concept of privilege. This article will explain what privilege is, give examples of typical privileged items, and discuss ways to successfully manage privileged information. Review of these steps when legal issues arise should help control unwanted disclosure of sensitive information during litigation.

Privilege is a legal right that allows a party to protect the confidentiality of

information during court proceedings. A common example of a privilege is the attorney-client privilege.

The attorney-client privilege exists when a client communicates with his attorney while seeking legal advice. For institutions, the scope of privilege can be rather broad depending on the jurisdiction. Courts have adopted a variety of tests to determine who the "client" is when an institution is involved. In Ohio, communications made to an employer's counsel by employees are encompassed within the attorney-

client privilege.

A common problem regarding privilege is the confusion between privileged information and confidential information. Communications are privileged only if made to (or in the presence of) counsel for the purposes of receiving legal advice. Confidential communications may not require the presence of counsel, but then such communications are not protected in litigation. For instance, communications made among employees without the presence of

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***“Our progress as a nation
can be no swifter than
our progress in education.
The human mind is our
fundamental resource.”***



John F. Kennedy

ASK THE BARRISTER

A: No, this is improper under both Federal law and the University’s HR policy. The Fair Labor Standards Act (“FLSA”) states that if the supervisor knows or should know of the overtime and does not stop such work, including discipline if necessary, then the employer is required to pay for overtime and violates the FLSA if it fails to do so. This is consistent with University policy that requires the prior approval of overtime and provides for discipline for violations of that policy. The FLSA is one of the most violated laws in the country.

Have a question? Ask the Barrister @ www.case.edu/president/counsel/

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Avoiding Retaliation Claims continued

staff and faculty to raise concerns about the workplace.

The university encourages employees to use the grievance processes to voice their concerns. Supervisors should make clear to employees that they are welcome to use the grievance processes. These processes help the university and the supervisors determine if there is an issue that needs to be addressed. The grievance policies are at:

- Staff: <https://www.case.edu/finadmin/humres/policies/services/grievance.html>
- Faculty: <http://www.case.edu/president/facsen/frames/handbook.htm>
- Supervisors should document employee performance issues in writing and address them with the employee on a consistent basis as soon as an issue arises, and document any performance issues in performance reviews.
- If an employee files a complaint, consider waiting until

the employee’s complaint is resolved to take any action concerning the employee.

- Supervisors should consider whether an employee might view an action as being done in retaliation for filing a complaint, including changing job duties, reducing salary, or making working conditions more difficult for this particular employee.
- If an employee brings a complaint and the supervisor has not documented performance issues prior to the complaint being filed, the supervisor may want to wait some reasonable period of time prior to deciding whether any employment action should be taken.

If supervisors have questions about the grievance processes or retaliation claims, they should contact the Employee Relations Office at 368-4503 or the Office of General Counsel at 368-4286.

Watching Your Words

Although it can happen in a slip of the tongue, profanity in the workplace or in an academic setting can create concerns for those who overhear it. Profanity used in the workplace or the classroom may make others uncomfortable or make them feel that the environment is hostile or not welcoming. Even if others don’t complain about the use of profanity, profanity creates an unprofessional work or academic environment and can lead to complaints against the staff or faculty member and the university.

For that reason, the University’s Human Resources Policies & Procedures require that employees engage only in professional communications with others. The policy states:

Professionalism in communications and behavior is the only acceptable form of interaction on campus and in related university business settings. Every employee is expected to conduct himself/herself in a manner that is a positive reflection of the university. When differences of opinions occur, only constructive, legitimate, and respectful forms of communication are considered appropriate.

https://www.case.edu/finadmin/humres/policies/standards/work_env.html

If members of the university community have concerns about professionalism in the workplace or need assistance in developing constructive communication skills, they should contact the Office of Employee Relations at 216-368-4503 or our the Office of General Counsel at 216 368-4286.

Privilege: A legal tool to protect information cont’d

counsel are not privileged, even if all parties agree that communications will be kept confidential. Such communications may be subject to discovery during litigation notwithstanding their confidential nature.

Another common problem that arises in the context of privilege is unintentional waiver. Waiver is voluntarily giving up a legal right. Privilege is subject to the rule of waiver. Courts have adopted rather relaxed standards on when a privilege can be waived. Even inadvertent disclosure can result in a waiver of privilege. In addition, disclosing privileged information to a third-party not considered to be part of the “client” will result in a waiver. Because this can interfere with the adequate defense of the university in a legal proceeding, it is important to follow the simple guidelines below when your office or department is involved in litigation.

- Notify the General Counsel’s office of issues that may result in potential legal liability to the University;
- Include a University attorney in discussions that may require protection from disclosure during litigation;
- Consult with the General Counsel’s Office about what documents and communications will be privileged; and
- Take active steps to ensure that privileged documents and communications are kept confidential and not disclosed to third-parties.

Taking an active role in ensuring that information eligible for privilege stays privileged is a strong step to helping ensure successful resolution of legal disputes. In turn, this helps strengthen our university.