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When Employees Are “Protected,” When They Are Not, And Why Employers Must Know the Difference

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Today's Topics

- What is “Protected Activity?”
- Retaliation Claims
- Anatomy of a Retaliation Suit
 - The Manager’s Bill of Rights
- Reducing the Risk of Retaliation Claims

What is “Protected Activity?”

The Basics – What Employee Activity is Legally Protected and What is Not?

- Employee activity is legally protected if federal, state or local law provide protection
- Employee activity is *not* legally protected if no federal, state or local law provide that protection

The Basics – Types of Legally Protected Activity

- Two Ways that Employee “Activity” May be “Protected”
 - Employee speech or other actions are directly protected by law, so “retaliating” against the employee for exercising that right is unlawful
 - Protection from “Retaliation” Related to Equal Employment Opportunity and Other Laws
 - Employee engages in “protected activity” by either:
 - Opposing conduct that the employee, in good faith, believes violates a law
 - Participating in enforcement procedures
- Employees are entitled to protection if they engage in protected activity on behalf of themselves or for the benefit of others

What Laws Directly Protect Speech or Other Conduct?

- Federal Laws:
 - Union or “Protected, Concerted Activity” (National Labor Relations Act)
 - **Union Activity:** Includes forming or attempting to form a union; joining a union; assisting in union organizing (or refusing to do any of these things) and being fairly represented by union
 - **Protected, Concerted Activity:** “Two or more employees take action for mutual aid or protection regarding terms and conditions of employment”
 - A single employee may be protected if acting for others
 - This applies to non-union employers
 - These laws may prevent discipline for rude, offensive or otherwise unprofessional conduct

What Laws Directly Protect Speech or Other Conduct?

- Are any of these actions “protected, concerted activity?”
 - Employee complains to supervisor: “Why are you always making me work overtime? You never make Sally do it and I’m more senior. It’s totally unfair.”
 - Employee posts on Facebook: “I hate my job. Management lets customers mistreat us every day. I am so sick of hearing ‘the customer is always right.’ Am I right? Co-workers – post the worst thing a customer said to you today!”
 - Two employees complain to company owner that their supervisor is rude, incompetent and is making everyone’s work-life miserable. They share that if the supervisor doesn’t go, they and others will.

What Laws Directly Protect Speech or Other Conduct?

- Federal or State Whistleblower Laws (con't):
 - Various Federal Whistleblower Laws
 - False Claims Act protects employees who report or act in furtherance of preventing fraud against the government
 - Michigan Whistleblower Protection Act
 - “Protected activity” is where the person (1) **reports** a violation or suspected violation of a law or regulation **to a public body**, (2) is **about to report** such a violation **to a public body**, or (3) is asked **by a public body** to participate in an investigation or proceeding.
 - Report cannot be knowingly false
 - May include report to an attorney!

“Protected Activity” Scenario

- Jennifer has worked as a teacher at ABC Learning Center, a daycare and preschool. Jennifer is great with the kids, but is constantly starting drama with her co-workers, mostly because she thinks they are incompetent. After Jennifer’s supervisor told her that she needs to start working more professionally with her co-workers or they were going to have to discharge her, Jennifer called an attorney’s office and left a message asking for a return call. Frustrated, she also reported to the State that ABC sometimes exceeded the maximum teacher to child ratio in classrooms.
 - Is Jennifer’s call to the attorney protected activity?
 - Is Jennifer’s report to the State protected activity?

What Laws Directly Protect Speech or Other Lawful Conduct?

- What about employees' "constitutional rights?"
 - The United States Constitution
 - First Amendment – Free Speech and Free Exercise of Religion
 - Second Amendment – Right to Bear Arms
 - Fourteenth Amendment - Privileges or Immunities of Citizenship; No Deprivation of Life, Liberty or Property without Due Process; and Equal Protection of Law
 - State Constitution
- Is the employer a governmental entity? If not, employers do not have to observe employees' "constitutional rights" at work.

What Laws Directly Protect Speech or Other Lawful Conduct?

- Is any of this employee conduct constitutionally protected?
 - Machine Operator at auto supply manufacturer wants to wear his "Let's Go Brandon" shirt to work.
 - School librarian posts "Dump Trump!" on Facebook.
 - Salesperson for medical supply company wants to keep his hunting rifle in the trunk of his car.
 - Executive Assistant at large retailer wants to put petition in support of reproductive choice in the breakroom.
 - What if the employer allows "pro-life" materials?

Equal Employment Opportunity and Other Laws that Prohibit Retaliation

- What other laws entitle employees to legal protection from retaliation?
 - Federal Statutes
 - Non-Discrimination based on **Race, Color, Religion, Sex, and National Origin** (Title VII)
 - “Sex” includes sex stereotypes, sexual orientation and gender identity
 - “Religion” requires reasonable accommodation absent undue hardship
 - Non-Discrimination and Reasonable Accommodation, Absent Undue Hardship, Based on **Disability** (Americans with Disabilities Act)
 - Non-Interference and Non-Retaliation Based on **Family and Medical Leave** (Family and Medical Leave Act)
 - Non-Discrimination based on **Age** (Age Discrimination in Employment Act/Older Workers Benefit Protection Act)

Equal Employment Opportunity and Other Laws that Prohibit Retaliation

- Federal Statutes (cont.)
 - Non-Discrimination and Reemployment Rights based on **Military Service** (Uniformed Services Employment and Reemployment Rights Act)
 - Non-Discrimination based on **Genetic Information** (Genetic Information Non-Discrimination Act)
 - **Unequal Pay based on Sex** (Equal Pay Act)
 - **Payment of Minimum Wage and Overtime** (Fair Labor Standards Act)

Equal Employment Opportunity and Other Laws that Prohibit Retaliation

- What laws entitle employees of **private, non-governmental employers** to legal protection?
 - Federal/Michigan Statutes
 - Reporting **workplace safety** concerns (OSHA/MIOSHA)
 - Michigan Statutes
 - Additional protections for **Height, Weight, Familial Status, and Marital Status** (Michigan's Elliott-Larsen Civil Right Act and Persons with Disabilities Civil Right Act)
 - **Workers' Compensation** (Workers' Disability Compensation Act)
 - **Payment of Wages and Fringe Benefits** (Wages and Fringe Benefits Act)
 - Wrongful Discharge in Violation of Public Policy

Equal Employment Opportunity and Other Laws that Prohibit Retaliation

- What about Employees Outside of Michigan?
 - Examples of Other State Statutes
 - Political Affiliation
 - Participation in Criminal/Judicial Processes
 - Leave for Voting or to Attend Certain School Activities
 - Off-Duty Lawful Conduct

What is Not “Protected Activity?”

- “Protected Activity” must relate to some legally protected characteristic, activity or right.
- “Bullying,” “harassment” or “discrimination” based on other factors is not legally protected.
 - Personality Conflicts
 - Political Differences (unless a public employee or otherwise protected by law)
 - Moral Differences
 - Michigan vs. Michigan State

“Protected Activity” Scenario

- James has been a bartender at the Oasis Lounge for 10 years. Since COVID, he has noticed a significant change in the work environment. They are completely understaffed, so customers often become angry and take it out on him. James has also noticed that customers have become much more ‘handsy’ with the female servers and he knows it makes them extremely uncomfortable. Last night, after the bar closed, James was having an after-work drink with the manager, and complained about how he felt personally “harassed” by customers. James also reported that he has witnessed customers sexually harassing the servers and “something needs to be done.”
 - Is James’ complaint about the servers “protected activity”
 - Is James’ complaint about himself “protected activity”

“Retaliation” Claims

Why Retaliation Claims Are More Dangerous Than Discrimination Claims

1. Even if the employee’s original complaint (the “protected activity”) has absolutely no merit, it can still be the basis for a later retaliation claim
 - Unless the baseless complaint was made in “bad faith” - knowingly false and for a bad purpose
 - But: It will be very difficult to prove that an employee knew his or her complaint was false or in “bad faith”

Why Retaliation Claims Are More Dangerous Than Discrimination Claims (Cont.)

2. Employees who think their job is in jeopardy can “set up” a retaliation claim by complaining about something
3. Managers who are accused of discrimination sometimes react with ill-considered remarks
 - Those remarks can be evidence of an unlawful “retaliatory” motive
4. Courts throw out discrimination claims far more often than retaliation claims, even in the same case
5. Retaliation claims get greater deference from the courts, because of the “public policy” concern to protect people who raise legal issues

How To Avoid Retaliation Claims?

1. Know what activity might be protected, and what’s not
2. Understand the situations that can give rise to a retaliation claim
3. Train your leaders and decision-makers how to avoid being caught in #2
4. If it’s too late, make prudent decisions in light of the risk

Anatomy of a Retaliation Suit

What Happens In a Retaliation Case?

THE EMPLOYEE'S "CASE:"

The employee must present evidence of four items:

1. **Protected Activity:** Employee engaged in it
2. **Employer Knowledge** of the employee's protected activity;
3. **"Adverse Action:"** By the employer against the employee; and
4. **Causal Connection, or Retaliatory Motive:** The protected activity was a cause of (or motivation for) the employer's adverse action against the employee

Item 3: What's an "Adverse Action"?

- Any action that might have dissuaded a reasonable employee from engaging in the protected conduct.
- The employer's action does not have to affect the "terms and conditions" of the employee's employment, or involve a "tangible job detriment."
 - This is broader than the "adverse action" required for a discrimination or harassment case.
 - That's one reason why it's easier for a claimant to win a retaliation claim than a discrimination claim

Item 4: Evidence of a "Causal Connection" or Retaliatory Motive

- This is the key issue in most retaliation cases:
 - How does an employee show that the employer's decision was motivated by the protected activity?
 - How does the employer show it was not?
 - It's always hard to prove a negative

Employee's Proof of a Retaliatory Motive

Option 1: "Direct" Evidence:

- This is evidence that – if believed – proves that the employer was motivated by the protected activity:
- *"I'm sick and tired of you claiming discrimination every time something happens that you don't like. Obviously, you're not happy here, so pack up, you're done."*

Case Study #1

- Job applicant files an EEOC charge claiming that the employer rejected her application because of her sex.
- A few weeks later, she applies for another opening at the same company.
- HR manager says: "We received an EEOC charge from her, so we thought it wouldn't be appropriate to communicate with her. So we didn't consider her application for the other job."

- Is this Direct Evidence of Retaliation?

Employee's Proof of a Retaliatory Motive

Option 2: "Circumstantial Evidence"

- This is evidence that *infers* or *suggests* that the employer's action was motivated by the employee's protected activity.

Circumstantial Evidence

- Three types of Circumstantial Evidence often used to infer a retaliatory motive:
 1. **Manager remarks** expressing hostility or irritation toward a protected activity – but short of "direct evidence."
 2. Temporal Proximity.
 3. Disparate Treatment.

1. Manager Remarks

- “All these FMLA days you’re taking are unfair to your co-workers.”
- “Joe could be a good employee, if he was half as diligent about his work as he is about looking for Mickey-Mouse safety violations.”
- “Michelle is a troublemaker and professional pot-stirrer. Now she’s inciting other employees to complain that their bonuses weren’t big enough and the new timekeeping system isn’t fair.”

2. Temporal Proximity

- “Temporal Proximity:” When an adverse action is close in time after protected activity
 - “I was my boss’ right hand man until a month ago, when I asked for an ADA accommodation. She started writing me up for every little mistake, and now I get a bad performance review.”
 - “Heightened Scrutiny:” Temporal proximity gets greater weight if an employee was subjected to “heightened scrutiny” of performance, conduct, attendance, etc. after engaging in protected activity

2. Temporal Proximity (Cont.)

- How long is too long? A 3-month gap between the three months an employee's protected activity and his discharge was "a firm indicator of a lack of a causal link." *Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 605 (6th Cir. 2022).
- So can we fire the employee 3 months and a day after her protected activity?

3. Disparate Treatment

- Disparate treatment: Treating someone worse than others, under similar circumstances:
 - "I make a phone call at work, and I get a written final warning. Joe does the same thing and gets a pass."
 - Rigidly identical treatment is not required, as long as job-related and lawful facts support a different decision

The Employer's Case

If the employee presents evidence to support the elements of his or her case, then –

The employer must present evidence showing the *legitimate non-retaliatory reasons* for its decision.

- What evidence will you have?
- Will it help or hurt your case?

The Employer's Case

This session is not about documentation.

It's about who has "rights."

When it comes to making lawful employment decisions, managers have rights, too ...

The Manager's Bill of Rights

As A Manager You Have The Right -

1. To apply your organization's standards for performance, conduct, quality, attendance, etc.
2. To conduct a thorough and timely investigation,
 - To require employees to participate,
 - To wait to make a decision until it's complete;

As A Manager You Have The Right - (Cont.)

3. To make a disciplinary decision, even when facts are disputed or unclear
 - The law does not require airtight proof to support the employer's decision
 - The law will honor your *good faith conclusions* based on a *reasonable investigation*
 - Even if the employee adamantly disagrees
 - Even in "he-said-she-said" cases
 - *Just be willing and able to say why you decided the way you did. Then write it down.*

As A Manager You Have The Right - (Cont.)

4. To issue the level of corrective action you consider to be appropriate
5. To consult with HR and other leaders about the facts and the appropriate decision
6. To exercise your best judgment, even if the employee thinks your decision is "wrong," "mean," or "stupid"
 - Your decision does not need to be "fair" or "correct" in anyone else's eyes

As A Manager You Have The Right (Cont.)

7. To determine the degree of an employee's accountability
– e.g., unintentional error, negligent error, risky decision, reckless act, willful misconduct
8. To determine the relative accountability of employees, if more than one employee is involved

The Manager's Bill of Rights

But

- You do not have the right to remain silent.
- You have all of the above rights, but only if you -
 - Honestly state the reasons for your decision,
 - Document them well, and
 - Don't consider (or tolerate) any illegal reasons



Anatomy of a Retaliation Suit

FINAL STEP: “Pretext”

- The employee tries to show that the employer’s reason has *no basis in fact*, was *not applied consistently* to “similarly situated” employees, or is *a sham* to cover up an illegal reason. For example:
 - When an employee fired for poor performance received a “meets expectations” rating six weeks earlier
 - When an employer comes up with reasons after-the-fact

Case Study #2

- Employee reports a back injury at work
- Employer sends him for same-day treatment; doctor diagnoses lumbar strain; prescribes meds and physical therapy; off work for two weeks
- After 2 weeks, employee returns to restricted duty, working for a different manager
- Four weeks later, restrictions expire, employee should return to his regular job. Employee reports back pain, says PT has told him to continue restrictions

Case Study #2 (Cont.)

- Employee's manager during light-duty work says employee was late 3 times, and a co-worker took a picture of him sleeping on the job.
- Employee's regular manager says employee refused to do assigned jobs on a few occasions and was not learning how to do the job.
- Both managers now want to terminate the employee, rather than bring him back to work.

Case Study #2 (Cont.)

- Any concerns about discharging the employee?
 - Protected activity?
 - Employer knowledge?
 - Adverse Action?
 - Evidence of retaliatory motive?
 - Temporal Proximity?
 - Employer's Non-Retaliatory Reason for Discharge?
 - Evidence those reasons might be a "Pretext"?

Reducing the Risk of Retaliation Claims

1. Protected Activity

- Reduce the likelihood that employees will feel the need to engage in protected activity:
 - a. Maintain a readily accessible, confidential, and effective internal complaint system;
 - b. Train employees and managers about it.
 - Internal complaints are always better than external complaints to agencies, lawyers, courts
 - c. Use it – every time.
 - A record showing that every employee’s complaint was processed in a consistent, prompt, fact-based manner is powerful evidence that the employer is not hostile to employees’ “protected activity”

2. Employer Knowledge

- You *want* to know about employees’ issues and complaints
- Train employees about their right to raise concerns, how and where to do so
- Train front-line leaders and managers to route all employee complaints to the leaders who are responsible to receive and respond to complaints
 - *Even when the employee says “I don’t want to make a formal complaint; I just want you to be aware ...”*
- Consider a hotline

3. Retaliatory Motive

- Build a record that shows the absence of a retaliatory motive:
 - a. In your policies prohibiting discrimination and harassment, include “protected activities” as well as “protected characteristics”

3. Retaliatory Motive (Cont.)

- b. When an issue or complaint arises, follow your process in each case
 - Take all complaints at face value; do not form any initial conclusions.
 - Regardless of whether the complainer is a frequent flyer whose complaints have no credibility
 - Especially in those cases.
 - Don't judge the complaint by the complainer.
 - Speak with the complainer in person.
 - Document the complaint; require the complainer to provide all relevant information
 - Document your investigation, findings, decisions

3. Retaliatory Motive (Cont.)

- c. Even when a complaint is baseless, or a personal attack on a leader, coach leaders:
 - The employee's expression of the complaint might be "protected"
 - So don't respond in frustration or anger; if you take the bait, that's how the complainer "wins"
 - Route the complaint to the people responsible for the process
 - Focus on the merits of the complaint, not on how much the complainer irritates you
 - Manage performance and behavior

4. Employer's Non-Retaliatory Reason; No "Pretext"

- When an employee has engaged in protected activity, pressure-test disciplinary decisions to make sure that:
 - They are based on a sound investigation and fact-based conclusions
 - They are based on a consistent application of your standards for performance, behavior, attendance, etc.
 - The factual conclusions and standards are well-documented

No Pretext: Make Sure That -

- The performance issues, behavior issues, etc. were addressed on a timely basis when they arose, not after-the-fact
- Any “protected activity” by the employee was handled properly; and
- No retaliatory motive – by anyone – has been allowed to impact the decision



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