Retaliation and Whistleblowing:
What You Need to Know to Protect Yourself From Retaliation Claims and Whistleblowers

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I. INTRODUCTION

High-profile retaliation and whistleblowing cases have raised awareness of such claims. Employees bringing such claims are often portrayed as heroes who protect coworkers, shareholders, or the public from management wrongdoing.

Remedies for illegal retaliation include lost wages and benefits, and reinstatement for discharged employees. Under some claims, damages for emotional distress and punitive damages can be awarded. Some retaliation claims are tried before a jury.

The Supreme Court of the United States over the last six years has repeatedly ruled in favor of employees complaining about retaliation. Likewise, both Congress and state legislatures have enacted new laws to protect whistleblowers.

II. STATUTES PROTECTING EMPLOYEES' INTERESTS

Typically, a statute that grants a right or benefit to an employee also protects the employee from discrimination or retaliation for exercising that right or for pursuing the benefit.

A. Employment Discrimination and Harassment

1. Statutory Basis

State and federal statutes prohibit employment discrimination and harassment on the basis of other protected classes, such as race, color, national origin, religion, sex, disability, age, marital status, or veteran status. These statutes create a procedure for the employee to make an administrative claim or file a lawsuit. They also prohibit retaliation against employees who make good-faith claims that they have been victims of discrimination or harassment, who participated in investigation of such claims, or who otherwise opposed allegedly unlawful action. See, e.g., 42 USC § 2000e-3(a) (Title VII); ORS 659A.030(1)(f); RCW 49.60.210 (Washington's retaliation and whistleblower statute).
2. Expanding Coverage of Retaliation Claims

The U.S. Supreme Court has expanded the basis for making retaliation claims. In statutes such as Title VII that expressly prohibit retaliation, the Court has read the prohibition expansively beyond the literal construction of the retaliation provisions. In other statutes, generally barring discrimination but lacking express prohibition on retaliation, the Court has concluded that retaliation is covered by the antidiscrimination provision of the statutes.

- Title VII retaliation provisions cover employee who was fiancée of a person filing an EEOC employment discrimination claim. The fiancée was an "aggrieved person" under Title VII because the fiancée was in the "zone of interest" that the Act intended to cover. Thompson v. N. Am. Stainless, LP, ___ US ___, 131 S Ct 863, 178 L Ed 2d 694 (2011).

- "Opposition" clause of Title VII retaliation provision extended to protect employee who cooperated with an internal investigation that was initiated by someone else's complaint. Crawford v. Metro. Gov't of Nashville, 555 U.S. 271, 129 S Ct 846, 172 L Ed 2d 650 (2009).


- An employee can sue for retaliation under 42 USC § 1981 when complaining to manager that a fellow employee was dismissed because he was black. CBOCS West, Inc. v. Humphries, 553 US 442, 128 S Ct 1951, 170 L Ed 2d 864 (2008).


Lower courts have issued similarly expansive rulings:

- A teacher of disabled students could bring a retaliation claim based on her advocacy for disabled students under both Title II (public accommodations) of the Americans With Disabilities Act (the "ADA") and Section 4 of the Rehabilitation Act. She could not bring an action under Title I of the ADA (employment) because she did not allege termination because of her disability. Barker v. Riverside Cnty. Office of Educ., 584 F3d 821 (9th Cir 2009).
• Summary judgment denied when employee fired in retaliation for complaint filed by sister, even if he never opposed discriminatory actions. EEOC v. Willamette Tree Wholesale, Inc., No. CV 09-690-PK, 2011 WL 886402, 111 FEP Cases (BNA) 1392 (D Or Mar. 14, 2011).

3. The Supreme Court Has Expanded the Sorts of Adverse Actions That Are Actionable

• Title VII retaliation clause protects an employee from retaliation for any form of materially adverse action, including those outside of work or beyond discriminatory actions in the terms of conditions of employment made unlawful by Title VII. Burlington N. & Santa Fe Ry. Co. v. White, 548 US 53, 63, 126 S Ct 2405, 165 L Ed 2d 345 (2006).

• Employer action must be "materially adverse" rather than involve mere trivial harms, such that the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." White, 548 US at 68 (internal quotation marks and citations omitted).

Not all changes are material:

• Lack of materiality found when postal service employee claimed he was granted less favorable break times than coworkers and was temporarily assigned front window instead of his preferred back room job. Morales-Vallellanes v. Potter, 605 F3d 27 (1st Cir 2010).

B. Labor Laws

Labor laws, including the National Labor Relations Act, the Oregon Public Employee Collective Bargaining Act, and the Washington Public Employees Collective Bargaining Act, generally protect employees, whether represented by a union or not, who exercise statutory rights, including the right to bargain collectively or to file an unfair-labor-practices charge with the union or an agency. 29 USC §§ 157, 158(a)(1); ORS 243.672(1); RCW 41.56.140. Protected activities include:

• engaging in protected activity;
• attending union meetings;
• engaging in union-related activities on the employer's premises, as long as it occurs on break time or is within the employer's normal policies regarding use of work time for personal purposes;
• pursuing a grievance under the collective bargaining agreement;
• talking to the union about a pending grievance or arbitration;
• discussing strike-related topics in an area and at a time in which employees are commonly allowed to have personal discussions;
• wearing union insignia at work as long as it is not disruptive;
• participating in a proceeding before the National Labor Relations Board or similar state agency; and
• acting as a union steward, member of the union bargaining team, or union officer.

C. Leave Laws

Under the federal Family Medical Leave Act, the Oregon Family Leave Act, the Washington Military Family Leave Act, the Washington Family Care Leave Act, and Oregon and Washington domestic violence/sexual assault leave statutes, eligible employees are entitled to restoration to their jobs or equivalent following unpaid leave for certain prescribed periods. Retaliating against an employee for exercising leave rights is an unlawful employment practice. 29 USC § 2615; ORS 659A.171; RCW 49.77.030; RCW 49.12.287; ORS 659.A.270; RCW 49.76. Examples might include:

  • discouraging absences by terminating an employee requesting leave;
  • disciplining or discharging an employee who has regularly (but legally) utilized leave laws because the employer is frustrated by the use of leave.

D. Occupational Health and Safety Laws

Employees cannot be retaliated against for making a federal OSHA, OR-OSHA, or WISHA complaint, instituting an OSHA action, otherwise opposing a safety and health violation, or testifying or preparing to testify in an OSHA proceeding. Employees are protected whether they are acting to protect themselves or others. 29 USC § 660(c); ORS 654.062(5); RCW 49.17.160. "Opposing" a safety or health violation can mean reporting the alleged violation inside or outside the agency.

1. Federal Law Remedies

Under federal law, an employee who feels he has been discharged for reporting a safety or health violation can file a complaint with the Department of Labor within 30 days of his discharge, and the Department will then investigate the charge. 29 USC § 660(c). The Department is authorized to then bring an action in federal district court if it finds that the employee has been wrongfully discharged, and the court can order "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."
2. Oregon Law

In Oregon, the period for filing retaliation claims with BOLI under the Oregon Safe Employment Act has been expanded to 90 days. ORS 654.062(6)(a). BOLI will investigate and can pursue an administrative remedy or the claimant can bring a civil action for "all appropriate relief including rehiring or reinstatement to the employee's former position with back pay." ORS 654.062(6)(c), (d).

"All appropriate relief" does not include compensatory or punitive damages. Availability of relief does not preclude common-law suit for wrongful discharge. Cantley v. DSMF, Inc., 422 F Supp 2d 1214 (D Or 2006).

3. Washington Law

Washington law prohibits employers from discharging or in any manner discriminating against an employee who has filed a complaint or caused any WISHA proceeding to be initiated. As under federal law, the employee must file a complaint within 30 days, at which point the agency generally investigates the claim. Even if the agency determines that no violation occurred, the employee can still file an independent action in superior court. In Cudney v. Alseo, Inc., Case No. 83124-6 (September 1, 2011), the Washington Supreme Court held that the statute provided the exclusive remedy for WISHA retaliation and therefore barred a common law wrongful discharge claim.

E. Wage-and-Hour Claims

An employee cannot be subject to retaliation for making a claim that the employer's payroll practices violate wage-and-hour laws. This protection extends to a complaint that overtime is not being properly calculated, that employees have not been properly paid for all hours worked, or that employees are improperly being treated as exempt from overtime. The complaint could be made as a grievance to the employer, as a complaint to the state or federal administrative agency, or as a lawsuit. Employees are also protected for testifying or preparing to testify in a wage-claim case and for consulting an attorney about a wage claim. 29 USC § 215(a)(3); ORS 652.355; RCW 49.46.100.

1. Supreme Court expands what is protected activity under federal Fair Labor Standards Act (FLSA)

In Kasten v. Saint-Gobain Performance Plastics Corp., ___ US ___, 131 S Ct 1325, 179 L Ed 2d 379 (2011), an employee was disciplined and then discharged for not complying with the firm's rules about punching in and out of the time clock. The U.S. Supreme Court ruled that the employee had stated a retaliation claim because he had orally complained about the location of the time clock and the need to "don and doff" his work clothes without being allocated sufficient time to clock in and out. The Supreme Court determined that the intent of the anti-retaliation statute extends to all forms of complaint, both oral and written.
Are punitive damages available in a FLSA retaliation claim? The U.S. Court of Appeals for the Ninth Circuit has not definitely decided, and there is a split among other circuits. See discussion in Campbell-Thomson v. Cox Comm'ns, No. CV-08-1656-PHX-GMS, 2010 WL 1814844 (D Ariz May 5, 2010).

2. Oregon

Oregon's wage-and-hour statute, ORS 652.355, offers employees protection from more than just "retaliation." The statute "does not prohibit discharge or discrimination only when motivated by a desire to retaliate for the filing of a wage claim. It prohibits discharge or discrimination 'because of' the filing of a wage claim, whether an employer's concern is for retaliation or for avoidance of future damages." Brown v. American Property Management, 167 Or App 53, 58, 1 P3d 1051 (2000).

3. Washington


F. Workers' Compensation Claims

An employee cannot be subject to retaliation for filing a workers' compensation claim, regardless of whether the claim is granted, or for participating in a workers' compensation proceeding. ORS 659A.040; RCW 51.48.025.

1. Oregon

A claim for retaliatory discrimination for filing a workers' compensation claim under ORS 659A.040 constitutes an unlawful employment action that may be pursued in a private action or through a BOLI administrative complaint. Actions for workers' compensation retaliation are covered by the full range of common-law remedies and are triable by jury. ORS 659A.885(3).

An employee may invoke claim workers' compensation retaliation without necessarily filing a formal claim for workers' compensation. If an employer knows that an employee has an occupational disease, "that knowledge constitute[s] a claim, even if [the employee] had not given the written notice that was required to perfect [his claim]." McPhail v. Milwaukie Lumber Co., 165 Or App 596, 604, 999 P2d 1144 (2000).

2. Washington

Washington law provides for the possibility of two types of actions for employees claiming retaliation related to a workers' compensation claim. The employee can
either follow the administrative prerequisites set forth under RCW 51.48.025 and bring a statutory action or try to bring a claim for wrongful discharge (even if the employee has not filed a complaint within 30 days of the claimed violation) in violation of public policy. Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn2d 46, 821 P2d 18 (1991). The public-policy claim, however, is available only if the employee has been discharged. Warnek v ABB Combustion Engineering Services, Inc., 137 Wn2d 450, 972 P2d 453 (1999).

A claim was stated for "workers' compensation harassment" in Robel v. Roundup Corp., 148 Wn2d 35, 59 P3d 611 (2002). There, the Washington Supreme Court held a retail employer liable for retaliation against an employee who filed a claim for workers' compensation retaliation based on her coworkers' behavior. The court agreed with the trial court that verbal and nonverbal "harassment" such as name calling, laughing, giving "dirty looks," and acting out a slip-and-fall constituted unlawful harassment and held the employer liable for the workers' actions.

3. Employer Actions That Are Not Retaliation for Filing a Workers' Compensation Claim

In a pair of recent cases, the U.S. Court of Appeals for the Seventh Circuit issued two decisions interpreting an Illinois law on workers' compensation retaliation, which could have some impact here. In Gacek v. American Airlines, Inc., 614 F3d 298 (7th Cir 2010), the court held that Illinois permits employers to use surveillance to test the bona fides of a workers' compensation claim, and deemed the suit frivolous. In Casanova v. American Airlines, Inc., 616 F3d 695 (7th Cir 2010), the court overturned a million-dollar jury verdict for an employee placed under surveillance and questioned and then fired for both lying to the investigating managers and refusing to fully and honestly answer their questions.

III. PROTECTING PUBLIC INTEREST

Some statutes are intended to protect the interests of the public by encouraging people to report suspected violations of the law. These statutes are commonly called whistleblower laws. The person who blows the whistle is protected from retaliation, even if it is ultimately determined that no legal violation had occurred.

A. Statutes That Cover a Specific Area

Examples are:

Sarbanes-Oxley Act imposes civil liability for retaliation when an employee of a publicly traded company reports a reasonable belief in the violation of (1) a rule or regulation of the SEC, (2) any federal law pertaining to fraud against shareholders, or (3) criminal laws prohibiting mail fraud, bank fraud, or fraud by wire when a federal agency or official, a supervisor of the employee, or an
employee with the authority to investigate corporate conduct is engaged in an investigation. 18 USC § 1514A(a)(1).

Aggrieved employees must file a complaint with the Department of Labor (the "DOL") within 90 days of the alleged discrimination, and the DOL must conduct an investigation within 60 days. An employee may file a lawsuit if the DOL has not issued a final decision within 180 days. A successful employee can be reinstated and recover back pay with interest, emotional damages, and attorney fees. 18 USC § 1514A(b)(1)(B).

While Sarbanes-Oxley Act is applicable to publicly traded companies only, one federal court has decided that the whistleblower provisions are applicable to employees of privately held companies that subcontract or contract with public companies. Lawson v. FMR LLC, 724 F Supp 2d 167 (D Mass 2010) (certifying issue for appeal).

"Leaks to the media are not protected." Tides v. Boeing, Inc., 644 F3d 809 (9th Cir. May 3, 2011) (the Act "protects employees of publicly-traded companies who disclose certain types of information only to the three categories of recipients specifically enumerated in the Act—federal regulatory and law enforcement agencies, Congress, and employee supervisors").


The federal Employee Retirement Income Security Act ("ERISA") protects employees who give information or testify in any inquiry or proceeding about an employer's compliance with ERISA. 29 USC § 1140.

Oregon law protects persons who report or are witnesses in a proceeding about suspected abuse or neglect in an adult foster home (ORS 430.755; OAR 309-040-0280; OAR 309-041-0810), in assisted-living facilities (ORS 430.450; OAR 411-056-0010), and in nursing facilities (OAR 411-085-0360).

Other federal statutes that address public health and safety and offer whistleblower protection: Asbestos School Hazard Detection & Control Act, 20 USC § 3608; Aviation Investment and Reform Act, 49 USC § 42121; Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9610; Clean Air Act, 42 USC §§ 7401, 7622; Energy Reorganization Act (Atomic Energy Act), 42 USC § 5851; Federal Water Pollution Control Act, 33 USC § 1367; International Safe Container Act, 46 USC App § 1506; Occupational Safety & Health Act, 29 USC § 660(c); Solid Waste Disposal Act,
B. Oregon's Broad Whistleblower Statutes

Oregon law includes a broad range of whistleblowing protections in ORS 659A.199 to 659A.236. These statutes protect employees from retaliation, in any term or condition of employment, for the following disclosures or other actions:

1. An employee's good-faith reporting of information that the employee believes is evidence of a violation of a state or federal law, rule, or regulation. ORS 659A.199.

2. An employee's good-faith reporting of criminal activity by any person. ORS 659A.230(1).

3. An employee's good-faith
   - causing of a criminal complainant's information or complaint to be filed against any person;
   - cooperation with any law enforcement agency conducting a criminal investigation;
   - bringing of a civil proceeding against an employer; or
   - testimony at a civil proceeding or criminal trial.

   ORS 659A.230(1).

But if the employee was not aware that the action about which he or she complained was a violation of a law, and in fact sought to obtain the same benefit of such a violation (e.g., taking break time at end of shift in order to leave work earlier than the end of shift), the employee cannot establish that his or her complaint was made in good faith. See Roberts v. Oregon Mutual Ins. Co., 242 Or App 474, 255 P3d 628 (2011).

In addition, this provision does not protect internal complaints to management from a salesman about what he perceives to be unethical and unfair sales practices. Lamson v. Crater Lake Motors, Inc., 346 Or 628, 639-40, 216 P3d 852 (2009).

4. An employee's good-faith
   - reporting of violations of ORS chapter 441 (relating to health care facilities) or ORS 443.400 to .455 (relating to residential care facilities); or
• testimony at unemployment compensation hearings.

ORS 659A.233.

5. Public employees enjoy the additional protections of ORS 659A.200 to 659A.224, relating to the disclosure of information to an agency, public or news media, that the employee reasonably believes is evidence of:

• a violation of a federal or state law, rule, or regulation by the employer;

• mismanagement, which excludes terminations for routine employee complaints that are disruptive, Bjurstron v. Oregon Lottery, 202 Or App 162, 120 P3d 1235 (2005);

• gross waste of funds;

• abuse of authority; or

• a substantial and specific danger to public health and safety.

ORS 659A.203.

Statutes and regulations also specify when the disclosure is not protected, including when the employee knows the disclosure to be false, the employee acts with reckless disregard for its truth or falsity, the disclosure relates to the employee's own misconduct. ORS 659A.218; OAR 839-010-0050(4).

Special rules direct protection of the whistleblower during an investigation to disclosed wrongdoing. OAR 839-010-0050(5)(b).

C. Washington Public-Sector Whistleblowing Law

Washington has also adopted whistleblower protection acts for state and local government employees. RCW 42.40.050, 42.41.040. Among actions specifically considered retaliatory are denial of adequate staff, frequent staff changes, frequent and undesirable office changes, and refusal to assign meaningful work.

D. Free-Speech Rights (Public Employment)

For public employers, whistleblower claims often overlap claims that a public employer infringed on an employee's rights to free speech. The First Amendment to the United States Constitution provides additional protection to public employees who speak out on a matter of public concern.

In order to be protected by the First Amendment, (1) an employee's disclosures must be made "as a citizen on a matter of public concern," not just a personal work issue, and (2) the agency's interest in nondisclosure must not outweigh the employee's interest in


- Statements of public concern, even if made privately during work time, but not part of official duties, are protected by the First Amendment. Anthoine v. N. Cent. Counties Consortium, 605 F3d 740 (9th Cir 2010).

E. Wrongful Discharge

Activity that is not protected by statute or the Constitution could result in a common-law claim for wrongful discharge.

1. Oregon

Oregon courts have categorized wrongful discharge into two general categories: termination for violation of social policy and termination for pursuit of a private statutory right related to the employee's role as an employee. Oregon courts have found that termination for the following can lead to a claim for wrongful discharge:

- Serving on jury duty;
- Threatening to make a report of patient abuse in a nursing home;
- Refusing to sign a potentially defamatory statement about a coworker;
- Refusing to violate airline regulations;
- Refusing to violate confidentiality rules about financial information;
- Refusing to make a false allegation of sexual harassment against a coworker;
- Resisting sexual harassment;
- Engaging in concerted activity to bargain with employer; and
- Making internal reports regarding questionable accounting practices to a supervisor.

See, e.g., DeBay v. Wild Oats Mkt., Inc., No. A142629, 244 Or App ___ (July 20, 2011) (finding public policy expressed in federal Sarbanes-Oxley Act protecting employees of publicly traded corporations against retaliation for reporting securities violations); Darbut v. Three Cities Research, No. 06-627-HA, 2009 US
Examples of unprotected activity:
Not every action by an employee can lead to a wrongful-discharge claim. For example, in *Dymock v. Norwest Safety Protective Equipment*, 334 Or 55, 45 P3d 114 (2002), the Oregon Supreme Court held that an employer did not wrongfully discharge an employee for refusing to sign a noncompetition agreement because Oregon's noncompete statute, ORS 653.295, does not create a right of an employee to refuse to sign such an agreement.

Additionally, in *Handam v. Wilsonville Holiday Partners, LLC*, 225 Or App 442, 201 P3d 920 (2009), the Oregon Court of Appeals held that an employee's report to his supervisors indicating that his coworkers had violated OLCC rules did not involve an important societal obligation that was sufficient to support a common-law claim for wrongful discharge.

Adequacy of statutory remedies:
Under Oregon law, if there is an "adequate" statutory remedy for a wrongful-discharge claim, then any common-law claim must be dismissed. *Reddy v. Cascade General, Inc.*, 227 Or App 559, 206 P3d 1070 (2009). It should be noted, however, that statutes that do not permit recoveries for punitive damages, such as the Sarbanes-Oxley Act, would not preempt a wrongful-discharge claim. *Olsen v. Deschutes County*, 204 Or App 7, 127 P3d 655 (2006). Also note that the Sarbanes-Oxley Act does not preempt state law.

2. Washington Law

Under Washington's tort of wrongful discharge in violation of public policy, a plaintiff must satisfy a four-factor:

(1) “the existence of a clear public policy (the clarity element)”;

(2) “that discouraging the conduct in which [he] engaged would jeopardize the public policy (the jeopardy element)”;

(3) “that the public-policy-linked conduct caused the dismissal (the causation element)”; and, finally,

(4) that “defendant has not offered an overriding justification for the dismissal (the absence of justification element).”

*Cudney v. Alsco, Inc.*, op. at 4-5, Case No. 83124-6 (September 1, 2011).

Washington courts generally find the public policy in Washington statutes that do not have a specific private right of action. In some cases, Washington has
allowed employees to pursue wrongful-discharge claims in addition to the rights afforded them under the statute. See Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn2d 46, 821 P2d 18 (1991). Washington employees are protected from retaliatory actions for serving on jury duty, reporting illegal activities, testifying truthfully, refusing to testify falsely, filing a workers' compensation claim, and making wage-and-hour complaints, among others.

An employer with fewer than eight employees that would otherwise be exempt from the Washington Law Against Discrimination may be subject to wrongful-discharge claims if it terminates an employee for complaining of sex discrimination. See Roberts v. Dudley, 140 Wn2d 58, 993 P2d 901 (2000) (finding that the plaintiff could bring a claim for wrongful discharge in violation of the public policy against sex discrimination although the employer never employed the minimum eight employees required to be subject to statutory liability).

In Cudney v. Alsco, Inc., Case No. 83124-6 (September 1, 2011), the Washington Supreme Court held that the statute provided the exclusive remedy for WISHA retaliation and therefore barred a common law wrongful discharge claim. Last year, the Washington Court of Appeals recently rejected a state-law wrongful-dismissal claim as preempted by the National Labor Relations Act. Kilb v. First Student Transp., LLC, 157 Wn App 280, 236 P3d 968 (2010) (a former supervisor claimed he was fired in retaliation for refusing to fire pro-union workers and pursue other anti-union tactics). The court of appeals held that the former supervisor's sole remedy was before the National Labor Relations Board.

IV. DEFENDING RETALIATION CLAIMS

Retaliation claims are generally subject to a three-part prima facie test:

A. Is There Protected Activity?

1. Not All Forms of Legitimate Complaints Are Protected

Criticism and complaints about racial discrimination in traffic stops do not translate into a complaint about employment discrimination and so are not protected by Title VII and were part of official duties, so not protected by First Amendment. Bonn v. City of Omaha, 623 F3d 587 (8th Cir 2010) (but consider public-policy tort in Oregon or Washington).

2. Did the Employee Make the Complaint Based on a Good-Faith and Reasonable Belief?

Employee complained about her supervisor "not working well with women" and cited his Southern Baptist religion. A participant cannot insulate self from discipline for lying to investigators and making false, possibly defaming, claims. Opposition clause requires that complaint be based on good faith and reasonable

B. Was There Adverse Action Covered by the Retaliation Provision?

1. Under Title VII or other statutes that bar any retaliation or discrimination for making a complaint, the employee need show only that

   - the employer engaged in some adverse action (not necessarily limited to terms of employment); and

   - the employer action was material.

The employer can defend by showing that it had not undertaken the action or that the adverse action was material.

2. Some statutes bar retaliation or discrimination in the terms and conditions of employment, which provides an additional inquiry whether any allegedly adverse action was a condition of employment.

C. Is There a Causal Connection Between the Protected Activity and the Adverse Action?

Causal connection can be established either by direct proof (express statements) or by circumstantial evidence.

1. Proximity in Time/Passage of Time

Courts have repeatedly stated that proximity in time (alone) is not sufficient. As a practical matter, however, courts seem to require very little evidence of causality when the protected activity immediately precedes the adverse action, and such timing can be very persuasive to a jury!

2. Decision Tarnished by Biased Supervisor's Recommendation (Cat's Paw Liability)

See Staub v. Proctor Hospital, ___ US ___, 131 S Ct 1186 (2011) (discharge of U.S. Army Reserve member alleged to have violated USERRA).

Compare Lakeside-Scott v. Multnomah Cnty., 556 F3d 797, 105 FEP Cases (BNA) 876 (9th Cir 2009): Independent investigation untarnished by biased supervisor with unbiased independent decision. Reversing a jury, termination was ruled not retaliatory although initiated as retaliation by an immediate supervisor. The final decision-maker made a wholly independent legitimate decision to terminate without relying on the biased supervisor.
3. **Supervisor Did Not Know That Plaintiff Had Made the Complaint**

Employee terminated after anonymous complaint about sex harassment and supervisor did not know that employee was one who had made complaint. *Rivera-Colón v. Mills*, 635 F3d 9 (1st Cir 2011).

4. **Adverse Action Is Part of Previous and Continuing Course of Management Concern and/or Discipline Predating the Complaint**

Female medical doctor terminated because of hostile attitude and staff complaints documented over the years and persistent complaints about unfair and discriminatory compensation practices. *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F3d 668 (7th Cir 2011).

5. **Termination After Ongoing Complaints (Over Years) About Sexually Discriminatory or Unfair Compensation System Not Sufficient**

*Leitgen*, 630 F3d 668 (above).

6. **What About Comparators?**

How have other complainants been treated? Workers' compensation claims are a great example. Out of hundreds of claims, many more serious than plaintiff's, others filing a workers' compensation claim have not been terminated.

D. **Other Legitimate Business Reason for Adverse Action That Lack Retaliatory Intent May Be Seen as a Defense or a Break in the Causal Connection**

This can be viewed as a defense to causality or as the next step in a Burdine-type of shifting-burden analysis. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn 2d 46, 70, 821 P.2d 18 (1991) (applying this shifting burden analysis in a Washington wrongful discharge tort claim).

Employer produced records substantiating that the employee was discharged for excessive absenteeism. EEOC Compliance Manual § 8-II (E)(2) (citing *Miller v. Vesta, Inc.*, 946 F Supp 697 (ED Wis 1996)).

Employer showed the termination was a layoff in response to adverse business conditions. *Fennell v. First Step Designs, Ltd.*, 83 F3d 526, 535 (1st Cir 1996).

E. **Participation Does Not Insulate Employee**

Female charged male coworker with sex harassment, and investigation turned up information that both had violated company's sex harassment policy. Both were suspended. Court held that it was not actionable just because company would not have conducted investigation without complaint. *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F3d 410, 110 FEP Cases (BNA) 1353 (8th Cir 2010).
Plaintiff could not have reasonably believed that she was subject to a hostile work environment when making internal complaint because she was not targeted for discrimination on basis of her sex. Thus, she had no basis for making retaliation claim. Chaloupka v. M Fin. Holdings, Inc., No. CV 1026-KI (D Or June 5, 2001).

V. BEWARE OF GOOD INTENTIONS

Action that an employer takes in an attempt to avoid continued allegations of legal violations can constitute retaliation. Examples:

„ An employee has alleged sexual harassment by a supervisor. Transferring the employee may seem like the safest way to prevent any dangerous interaction between them, but this action will constitute retaliation unless the employee wants to be transferred.

„ A supervisor who is accused of a legal violation may avoid the complaining employee, in order to protect himself from what he feels is a baseless charge. This "shunning" constitutes unlawful retaliation.

„ An employer may be concerned that an employee who has filed a protected claim will seek support and corroborating information from coworkers, thereby disrupting the workplace and creating a risk of disclosure of confidential information. Telling nonsupervisory coworkers to stay away from the complaining employee, and ordering them not to discuss the pending claim with the employee, will be unlawful retaliation.

„ When a promotional opportunity occurs, management may feel that a union steward is not a good candidate because of behavior and positions taken in meetings about union issues. Denying the employee the promotion on that basis will constitute retaliation.

VI. AVOIDING SUCCESSFUL CLAIMS

„ Policies: Ensure and communicate that your company or agency has a policy against all forms of retaliation and that the policy includes a procedure for complaint resolution. The policy should include more than one avenue for an employee to make a complaint. Publicly traded companies must have an anonymous and confidential procedure for reporting complaints of fraud.

„ Prompt investigation: Ensure that complaints are dealt with promptly by implementing a multilayered system for enforcing policies against improper conduct, such as a supervisor open-door policy used in conjunction with an ombudsman system.

„ Training: Train all employees on procedures for reporting complaints, and train managers and those responsible for the complaint procedure to follow it when complaints are made.
Reporting: Ask employees to report on any workplace concerns, including harassment, when completing self-evaluation forms or during annual performance reviews, and document their responses.

Follow-up: After resolution of complaints, follow up with the complainant to ensure that there is no retaliation. Do not assume that "no news is good news."

Record: Carefully document employment performance problems of all employees and accurately and completely evaluate and record employee performance.