

# RETALIATION

*Unlawful, Unethical, or Just to Be Expected?*

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When an employee blows the whistle on questionable or illegal conduct, is retaliation unlawful, unethical, or just to be expected? The answer to all three questions is “yes, it can be.”

Because of the devastating effects of recent business scandals, increased emphasis is being placed on developing and adhering to professional codes of ethics as well as integrating ethics into curricula. Effective internal processes enforcing adherence to laws and regulations, in addition to high standards of ethical conduct, are imperative. Employers must distinguish between right and wrong behaviors and react to violations in a responsible manner.

For years, Congress has sought justice and protection of the individual rights to life, liberty, and the pursuit of happiness with regard to employment. The Civil Rights Acts of 1964 and 1991, the establishment of the Equal Employment Opportunity Commission (EEOC), the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title IX of the Education Amendments of 1972, and the Americans with Disabilities Act of 1990 were all significant efforts to protect individual rights within the workplace.

But the potential for retaliation against employees who report violations required additional provisions. The Sarbanes-Oxley Act (SOX), enacted in 2002 to protect investors by improving the accuracy and reliability of corporate disclosures, provides for civil and criminal action to protect whistleblowers. It also requires the establishment and monitoring of corporate codes of conduct. Title VII of the 1964 Civil Rights Act also has explicit anti-retaliation provisions.

### POTENTIAL RETALIATORY ACTIONS

Retaliation occurs when an employer takes negative action against an individual because he or she has reported violations or has taken other actions protected by law. The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. While I can't provide a complete list because of the "creativity" of those at fault, retaliatory actions could include:

- ◆ Ostracism, shunning, or exclusion from meetings.
- ◆ Obscene mailings, displays, gestures, or insults.
- ◆ Vandalism of personal property.
- ◆ Anonymous letters, memoranda, results of surveys containing untruths or innuendos, or other communications to hurt the individual's reputation.
- ◆ Failure to recognize the individual's contributions, accomplishments, and honors.
- ◆ Surveillance or sharing of confidential information.
- ◆ Reprimands, negative evaluations, or "papering someone's file."
- ◆ Reassignment, demotion, suspension, discharge, reduction of responsibilities, failure to promote, or reduced opportunity for advancement.
- ◆ Threats, harassment, and other forms of discriminations or adverse action.

EEOC filings related to alleged retaliatory actions have experienced dramatic increases over the last several years—nearly doubling between 1992 and 2004. The EEOC has demonstrated a strong stance against retalia-

tion, specifically by taking a broad view of actions that may be considered retaliatory. Recent court decisions may not only encourage more individuals to seek legal remedies for retaliation but may also influence employers, employees, and others to reconsider taking actions, or encouraging others to take actions, that might be judged to be retaliatory.

### SARBANES-OXLEY

Section 806 of SOX provides legal protection against retaliation targeting employees of public companies who report suspected corporate fraud or other activities related to fraud against shareholders (see Table 1). Under SOX, employees who lawfully provide information to or assist in an investigation of conduct that they reasonably believed violated federal law can seek civil or criminal action if they are subjected to discrimination or retaliation. Prohibited actions specifically include discharge, demotion, suspension, threats, harassment, or any other form of discrimination.

Remedies include all relief necessary "to make the employee whole," such as compensatory damages for any special damages sustained as a result of the discrimination. This can include litigation costs, expert witness fees, and reasonable attorney fees.

SOX requires an individual to file a complaint with the Secretary of Labor within 90 days of the alleged violation. The Secretary of Labor delegated the responsibility of accepting complaints to the Occupational Safety and Health Administration (OSHA). If OSHA fails to issue a final decision within 180 days of the filing, the individual may institute an action in federal court.

For a person to assert a whistleblower claim under SOX, a preponderance of the evidence must show that:

- ◆ He or she engaged in protected activity,
- ◆ The employer knew about the protected activity,
- ◆ He or she suffered an unfavorable personnel action, and
- ◆ Circumstances exist to support that the protected activity contributed to the unfavorable action.

A whistleblower doesn't have to show an actual violation of law or cite a code section. Yet some specificity, not just general inquiries, may be required to constitute "protected activity."

Some lawsuits brought under SOX involve procedural or jurisdictional issues. Others examine whether sufficient specificity in the violation of the statute has been identified by the plaintiff or whether unfavorable action against the plaintiff appeared related to the protected activity.

## Table 1: Sarbanes-Oxley Act of 2002: Section 806 Provision for Retaliation Protection

- (a) Whistleblower Protection for Employees of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
- (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
    - (A) a Federal regulatory or law enforcement agency;
    - (B) any Member of Congress or any committee of Congress; or
    - (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
  - (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.
- (b) Enforcement Action
- (1) In General—a person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c) by—
    - (A) filing a complaint with the Secretary of Labor; or “(B)” if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.
  - (2) Procedure—
    - (A) In General—An action under paragraph (1)(a) shall be governed under the rules and procedures set forth in section 42121(b) of title 49,
    - (B) Exception—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.
    - (C) Burdens of Proof—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.
    - (D) Statute of Limitations—an action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.
- (c) Remedies—
- (1) In general—an employee prevailing in any action under section (b)(1) shall be entitled to all relief necessary to make the employee whole.
  - (2) Compensatory Damages—Relief for any action under paragraph (1) shall include—
    - (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
    - (B) the amount of back pay, with interest; and
    - (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
- (d) Rights Retained by Employee—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

Source: P.L. 107-204, 116 Stat. 245, 2002, Title VIII Section 806 18 U.S.C. §1514A.

In *Hanna v. WCI Communities, Inc.*, the court ruled that, to comply with SOX rules, the plaintiff must first file a complaint with OSHA. The court also ruled that the plaintiff can obtain an in-depth, independent, and fresh review (de novo review) of any SOX administrative complaint not resolved by the Department of Labor's final decision within 180 days of filing the complaint.

In *Bechtel v. Competitive Technologies, Inc. (CTI)*, Scott Bechtel and a coworker were fired after expressing concerns about CTI's financial reporting practices. The Secretary of Labor issued a preliminary order of reinstatement, which CTI refused to honor. A federal judge, however, ruled that, under SOX, the Secretary of Labor, not the court, has jurisdiction to enforce a preliminary order of reinstatement. The judge ordered they could return to work with compensation for lost pay and benefits.

In *Fraser v. Fiduciary Trust Company International*, the court ruled that in providing evidence that the employee was engaged in a protected activity, a certain degree of specificity with respect to the violation, and not just general inquiries, must be made. SOX protects an employee who provides information that he or she "reasonably believes constitutes a violation." The employee doesn't have to prove the violation but must identify the conduct believed to be illegal.

In *Collins v. Beazer Homes USA*, the plaintiff alleged that the homebuilding company was overpaying invoices and sales commissions and that certain individuals received kickbacks from lumber purchases. The court ruled that the plaintiff isn't required to show an *actual* violation of the law but only that she reasonably believed that there was a violation of an enumerated law or regulation.

But not every decision favors the employee. In *Brady v. Calyon Securities*, the ruling stated that whistleblower protection doesn't extend to employees of companies not publicly traded or to foreign employees in foreign subsidiaries of publicly traded American parent companies. And in *Carnero v. Boston Scientific Corporation (BSC)*, an Argentinean citizen claimed he was terminated for telling BSC, a foreign subsidiary of a publicly traded American parent company, about false invoices and inflated sales figures. Although SOX covers alleged retaliation against an employee of a subsidiary of a publicly traded domestic company, there is a presumption against extraterritorial application.

## TITLE VII

Title VII of the 1964 Civil Rights Act makes it unlawful to fail or refuse to hire someone—or to fire or otherwise

discriminate against them with respect to compensation, terms, conditions, or privileges of employment—because of their race, color, religion, sex, or national origin. It also notes:

*It will be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*

Generally, courts have held that a plaintiff must prove that he or she engaged in a protected activity, suffered an adverse employment action after participating in that protected activity, and that the protected activity caused the retaliation. If the court decides the complaining employee reasonably believed the conduct violated Title VII, the employee is to be protected regardless of whether the employer's conduct was actually unlawful.

A "retaliatory hostile work environment," such as persistent insults or exclusion from meetings, can support a whistleblower claim. Other recent court decisions have held that a reduction in responsibilities or in the opportunity for advancement, even without any reduction in salary or benefits, can support an adverse employment action claim. The Sixth Circuit ruled in *White v. Burlington Northern & Santa Fe Railway Co.* that reassigning the employee constituted unlawful retaliation. The U.S. Supreme Court unanimously upheld the ruling last year in *Burlington Northern & Santa Fe Railway Co. v. White* and opined that Title VII's anti-retaliation provision isn't limited to actions affecting employment terms and conditions but covers actions that "would be materially adverse to a reasonable employee" or "dissuade a reasonable worker from making or supporting a charge of discrimination."

It's also important to note that the U.S. Court of Appeals for the Third Circuit in *Jensen v. Potter* held that if the supervisor creates retaliatory harassment, the employer is strictly liable for failure to take prompt and remedial action. Although the court recognized that the law doesn't mandate a happy workplace, discriminatory ridicule or abuse can so infect the workplace that it alters the terms or conditions of the individual's employment, constituting an adverse employment action.

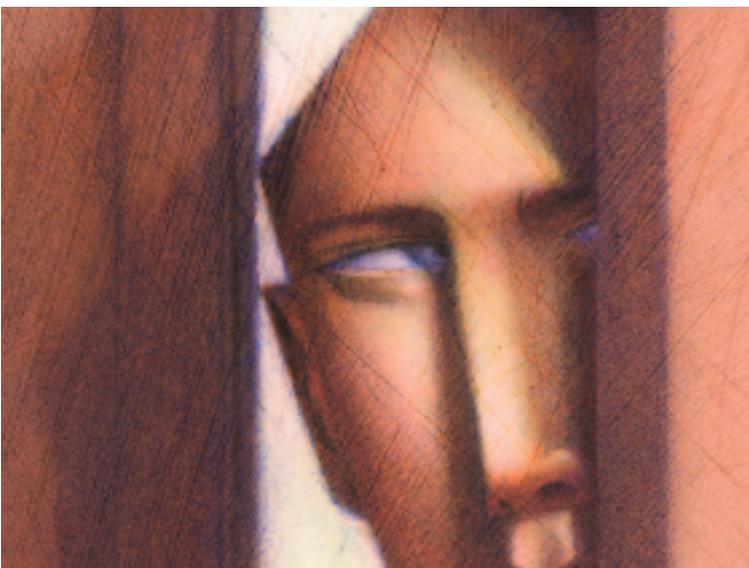
Finally, in *Burlington Industries v. Ellerth*, the court held that the employer was subject to vicarious liability for an

actionable hostile environment created by a supervisor, even when no tangible employment action was taken.

## TITLE IX

While it is increasingly clear that it's an "unlawful employment practice" under Title VII for an employer to retaliate against an employee, a recent Supreme Court decision now recognizes that such retaliation is also illegal under Title IX of the Education Amendment of 1972.

The Supreme Court ruled in *Jackson v. Birmingham Board of Education* in 2005 that individuals who protest sex discrimination may sue under Title IX if they experience retaliation as a result, even if they weren't the direct victim of the discrimination. The Court noted that Congress



enacted Title IX to provide individual citizens with effective protection against discriminatory practices. As such, reporting incidents of discrimination is integral to Title IX enforcement, and whistleblowers should be protected.

## THE EEOC

The EEOC, the primary federal agency charged with enforcing the federal anti-discrimination laws, has defined retaliation very broadly. Unlike some discrimination provisions, which make unlawful only discrimination that affects an employee's "terms, conditions, or privileges of employment," the EEOC has concluded that an "interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the Equal Employment Opportunity statutes and conflict with the language and purpose of the anti-retaliation provisions." For example, the EEOC manual

suggests that an employer who orders employees to keep a complaining party under surveillance would be guilty of retaliation.

In *Gunnell v. Utah Valley State College*, the plaintiff claimed that after she filed a notice of discrimination, her duties changed, her employer instructed people not to talk to her, and coworkers made false accusations. The Tenth Circuit upheld a verdict favoring the employer but held that "coworker hostility or retaliatory harassment, if sufficiently severe, may constitute an adverse employment action for purposes of a retaliation claim." The court went on to hold that an employer may be liable for retaliation if the employer orchestrated, condoned, or encouraged harassment.

In *Knox v. State of Indiana*, corrections officer Kristi Blackburn Knox complained that her supervisor didn't investigate accusations of retaliatory harassment in a timely fashion, perhaps to punish her for making a sexual harassment complaint. The Seventh Circuit ruled in Knox's favor and upheld a lower court ruling. The ruling indicates that an employer may be liable for retaliatory actions by coworkers if it knew or should have known of the problem and failed to respond adequately. In *Beardsley v. Webb*, the court held it was permissible to submit a claim of retaliation to a jury when a supervisor refused to speak to an employee who complained of sexual harassment.

In *Munday v. Waste Management of North America, Inc.*, the plaintiff filed a claim of sexual harassment and sex discrimination after being fired. The parties reached a settlement agreement in which the plaintiff would get her job back and the company wouldn't retaliate. The general manager subsequently told his employees to ignore her or talk to her as little as possible, and another manager told employees to report back anything she said to other employees. The district court held that this conduct, as well as evidence that the plaintiff's coworkers refused to talk to her, was sufficient to prevail on a claim of retaliation. But the Fourth Circuit reversed the ruling, holding that the conduct did *not* constitute an "adverse employment action" because there was no evidence that "the terms, conditions, or benefits of employment were adversely affected."

To date, appeals courts across the country have differed over what constitutes retaliation. But the decisive and liberal Supreme Court ruling in *Burlington Northern & Santa Fe Railway Co. v. White* should send the signal that all but trivial actions taken against an employee filing a discrimination claim are illegal. Increased retaliation complaints may be forthcoming as a result.

## THE CASE FOR ETHICS

Even if the actions taken against a whistleblower, a plaintiff, or other individual aren't deemed illegal, are they ethical? Is attempting to destroy someone's reputation, treating the person rudely or disrespectfully, or failing to recognize their contributions or accomplishments demonstrating the ethical values of justice, honesty, integrity, fairness, objectivity, a concern for the well-being of others, or for preventing harm to others? Our corporate and professional codes of conduct would seem to make this type of behavior inappropriate.

The Institute of Management Accountants' (IMA®) *Statement of Ethical Professional Practice* has identified honesty, fairness, objectivity, and responsibility as overarching ethical principles and has specified that competence, confidentiality, integrity, and credibility are standards that should guide conduct. (You can find the *Statement of Ethical Professional Practice* on the IMA website at [www.imanet.org/about\\_ethics\\_statement.asp](http://www.imanet.org/about_ethics_statement.asp).)

The standard of *competence* includes performing professional duties in accordance with relevant laws, regulations, and technical standards. The standard of *confidentiality* emphasizes that information be kept confidential except when disclosure is authorized or legally required and requires monitoring subordinates' activities to ensure compliance regarding appropriate use of such information. The standard of *integrity* requires mitigation and disclosure of actual or potential conflicts of interest and abstaining from engaging in or supporting any activity that might discredit the profession. And the standard of *credibility* requires communication of all relevant information fairly and objectively.

Actions that violate the letter or intent of laws, involve failure to maintain confidentiality, attempt to "punish," or create an uncomfortable or hostile work environment, whether determined to be illegal or not, would appear to violate reasonable standards of professional ethics.

## UNDERSTANDING AND PREVENTING

If you file a grievance against an individual, it wouldn't be reasonable to expect that person to respond with a gracious attitude. In addition, other employees may side with them because of friendship, because they don't want to recognize that they have been part of the mistreatment as active or passive participants, or because they may simply disagree with the validity of the complaint. Depending on how the organization handled the grievance and any previous situations, other coworkers may also be concerned that they, too, could be subjected to retaliation.

Therefore, if you file a complaint, be reasonable in your assessment of coworkers' behaviors. If the organization maintains confidentiality, most coworkers shouldn't even know about the grievance; their behavior may have nothing to do with you or the grievance. It may take time and employee turnover before a more normal working environment exists. In the meantime, do your job, and do your best to get along with your coworkers. But if retaliation occurs, visit with the appropriate individuals in your organization, and report the retaliation promptly. Recognize that, in extreme cases, you may need a new job; your health and potential for career advancement may demand a change.

As for employers, it is generally accepted that they can be held liable for harassment or retaliation by coworkers under certain circumstances if they encouraged, knew of, or should have known of the harassment and failed to take adequate action. What actions should they take to prevent retaliatory actions and possibly avert legal actions? Several measures should be considered, implemented, and monitored: Policies that require adherence to laws, regulations, and strong professional and personal ethics should be developed, communicated, and enforced. An appropriate "tone at the top" should be set and insisted upon throughout the organization. An internal grievance process should be put in place that provides effective checks and balances to prevent the misuse of power and influence. The message should be clear that adverse discrimination or retaliation will *not* be tolerated from employers, employees, or others.

The employer's response to complaints should be consistent, timely, and well documented. Documentation should be complete and protected from inappropriate circulation, misuse, or loss. Based on statutory and case law, it appears important that employers not change a protected employee's job responsibilities or benefits. Attempting to avoid the problem by removing the employee from the situation can be perceived as retaliation for the complaint.

Retaliation can be illegal and can involve costly litigation. At the very least, retaliation is unethical and can consume enormous amounts of time and human effort that could otherwise be devoted to value-added activities. ■

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