The Employment Law Counselor Episode 4

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, the Employment Law Counselor hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello, everyone, and welcome to the Employment Law Counselor Podcast. I'm your host, Jeff Stewart, and today we will be covering the topic of retaliation; what it is, and why employers should be concerned. This podcast is a collaboration between White and Williams, LLP, and the Professional Liability Underwriting Society, commonly referred to as PLUS.

While our podcast is not legal advice, it is a practical discussion between two attorneys that deal with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear, please give us a five-star review and subscribe so you never miss an episode. Today I'm joined by one of my colleagues here at White and Williams, John Baker, who [00:01:00] practices out of our firm's Lehigh Valley office.

How are you doing this morning, John?

John Baker: I'm doing well, Jeff. How about you?

Jeff Stewart: I'm doing great. Are you excited for our retaliation discussion?

John Baker: Yes, I'm very excited.

Jeff Stewart: So, why don't we jump right in? John, when you and I started talking about topics for this episode of the podcast we both kind of decided to talk about retaliation. And one of the reasons for that, is that in the most recent EEOC statistics, it found that 51.6 percent of all charges filed with the EEOC, contain an allegation of retaliation. Now, a lot of that is under Title VII, which covers sex discrimination, religious discrimination, race discrimination, etc. But also, under the ADEA, which is age discrimination, or the Americans with Disabilities Act, which is disability discrimination.

But as we were talking, you also pointed out that there's a lot of [00:02:00] non-EEOC laws that have anti-retaliation provisions.

John Baker: Yeah, Jeff, what we find whenever a complaint is filed in administrative agency such as OSHA or the NLRFB, there are retaliation provisions in those respective acts. So, OSHA would be Occupational Safety and Health Administration.

If a employee makes a complaint about an unsafe work practice or condition and suffers some adverse employment consequence, that could be a retaliation lawsuit under OSHA. Same with the NLRA, the National Labor Relations Act, if an employee engages in some activity, which includes making a complaint to management relating to the NLRA, there also is anti-retaliation provisions. In addition, there is state and [00:03:00] federal whistleblower laws that would apply and I'm sure that there's others as well.

Jeff Stewart: Absolutely, and retaliation is one of those claims that there's a claim under a number of different statutes, but for the most part, the elements of such a claim are the same regardless of whether it is under the NLRA or under Title VII or under OSHA, or under the ADA.

And that is, that there is some form of protected activity, which you mentioned. And then, some adverse employment action. So, let's kind of cover those a little bit in some detail. So John, let's start with protected activity. What are the most common kinds of protected activity?

John Baker: Jeff, one of the most common kinds is, when an employee verbally opposes an illegal practice.

That's taking [00:04:00] place in the workplace. Whether that practice affects that particular employee specifically or whether that practice affects the employees as a whole. That would be one of the most common.

Jeff Stewart: And it's also difficult to defend if you are the employer because if it's a verbally speaking out, you don't necessarily have a written record, correct?

John Baker: Correct. But you should create one when it is done.

Jeff Stewart: Absolutely. What are some other examples of protected activity?

John Baker: Another example would be if an employee takes part in an investigation. For example, there's an investigation by the EEOC about sexual

harassment. An employee takes part as a witness whose interest is contrary to the employer, that employer has to be very careful to engage in any kind of action that would affect [00:05:00] that opposing employee.

That's another example of what happens. Most commonly an employee makes a complaint about themselves, but less common, but also which can be affected if the employee makes a complaint about the workplace as a whole.

Jeff Stewart: Yes. And it's important to note that one of the reasons retaliation is such a dangerous claim is that that underlying claim, for example, let's say it's sexual harassment that only needs to be brought in good faith.

It may not rise to the level of being sexual harassment under the law, but as long as that claim is brought in good faith, that employee has protections against retaliation, even if that underlying claim is ultimately invalid.

John Baker: Yeah, you're right, Jeff. The courts have also dealt with a [00:06:00] lot of retaliation when a complaint is filed.

Commonly, there's a motion for summary judgment of some kind. Recent decisions from the courts have found that if an employee is complaining about just being snubbed, by his employer, or if an employee is complaining about an isolated, rude remark, not everything that an employee complains about gives rise to a retaliation claim.

Jeff Stewart: Absolutely. And, and frankly, this is a target that has moved many times over the years with various court decisions.

John Baker: Absolutely, Jeff. And it, and as many circuit courts, there are, you have that many different types of, of decisions. There's one, we're going to talk about the timing of a retaliatory action in a bit.

But I have found two different courts in two different jurisdictions saying the timing, 30 days difference between the act and the retaliation is not enough time. And 30 days between the act and the [00:07:00] retaliation is enough time. So, everything is very specific to the particular circumstances of that case.

Jeff Stewart: Absolutely. These are very fact-specific cases. So, let's talk, we talked about what that protected activity is on the part of the employee, but then for a retaliation claim, they must also show that they suffered some form of an adverse employment action. Now, that's obviously a legal buzzword, but in practical matters, that means most commonly, being terminated, being fired,

being suspended. But there are a lot more things that can qualify as an adverse employment action. Right, John?

John Baker: Oh, absolutely. Now you mentioned the ones that are most common. There are others, such as an employee does not get a promotion that employee may suffer an adverse consequence because the employee is excluded from things.

[00:08:00] And by that, I mean, the employee is not invited to upper-level meetings when other employees of the same, other employees with similar jobs are invited to those, an employee may claim that that's the adverse employment action. Not all these things are going to be adverse employment action. That's why it's a very fact specific defense, but I've seen cases where a negative report in the employee's personnel file that could seemingly be an adverse employment action.

Jeff Stewart: Yes. And, and in fact, I've seen cases where something as I'll say counterintuitive as not inviting someone to lunch who brought a complaint about you. My supervisor stopped inviting an employee, one of his subordinate employees, to lunch at various times. And [00:09:00] the employee brought a retaliation claim and said that by doing that, there was no longer any mentorship of the employee who brought any complaint and that hindered their opportunities to be promoted in the future.

And it was found to be a valid retaliation claim. The not inviting someone to lunch, which obviously you're not required to invite people to lunch, but when someone was specifically excluded, that was deemed to be retaliation in those circumstances.

John Baker: Absolutely, Jeff. And it's really important for employers to be aware that something as simple as the exclusion of someone can lead to number one, hard feelings. And what does an employee do with hard feelings? The employee looks to find something, some outlet to deal with that. And commonly, that outlet is with a [00:10:00] charge with the EEOC or whatever administrative agency is in charge.

What we want to do is counsel these employers to say, you have to treat people equally. Now, do I believe that it applies to whether you invite someone to lunch? I'm not sure, but it doesn't matter what I believe. Once someone's in the legal system, the employer has to defend. And that's where the problem is.

That's the costly consequence to the employers.

Jeff Stewart: Absolutely. And because these are so fact specific when it comes to these claims, they're not easily dismissed either on a motion to dismiss or even on summary judgment because the facts are so particular to each situation.

John Baker: Right. And the courts will also look at, let's say I didn't get invited to lunch with a group of my colleagues and I decided I had had enough and [00:11:00] I called the EEOC to say that that was an adverse employment consequence to me.

If that's the only thing that ever happened in this workplace, the court's going to kick that out and say, no, this is not enough. But if there is a history of this happening to me, and I can show, you know, a half a year, a year of all this kind of thing happening. Well, in that case, the court would take a closer look.

So, it's not just a matter of what the adverse employment action is, it's a matter of what's been going on in the workplace.

Jeff Stewart: Absolutely. And also, how were things prior to your complaint being filed versus after? You know, and, and the difference there, the starker the difference, you know, whether you were invited every Thursday and all of a sudden now you're never invited, that's very different than if pre-complaint you were invited once every three months, and now you didn't get invited the next six months, you know, that's very different.

John Baker: I have to say that the, [00:12:00] I think we're going to talk about this shortly, but the causal connection between the complaint and the action by the employer is really important and it's not always a matter of timing, but let's get into that.

Jeff Stewart: Sure, let's jump in now because normally, you know, one of the things that you need to show as a plaintiff to have a retaliation claim is that you engage in this, this protected activity, filing a complaint, being a witness, etc.

Then you suffered some form of adverse employment action. Then you need, as a plaintiff, to show that the two are connected. Now, normally, the most common of which is time, but time does not have a one size fits all rule, right John?

John Baker: No, time is not the absolute rule. If that were the case, we could easily dispose of all these cases.

A court would be able to they'd say well, did it fit within the time frame? If not, they're gone. So, what's the answer? Is 30 [00:13:00] days enough? Is one week enough of a distance between the complaint and the action? Who knows. One year? We don't know, and the courts take a different approach as I said earlier two different courts said 30 days was too long, and the other court said 30 days was not enough.

So, time becomes a factor, but it's only one of the factors.

Jeff Stewart: And one of the things that the courts look at is, was it one thing that happened or was it a series of things that happened?

John Baker: Correct. And that goes back to my example of not being invited to lunch. If it's just a one-off situation that has some connection to the termination or the or the adverse action, court's going to look that with a little more suspicion and employers therefore should not be as concerned about those but obviously, of course, you'd always you know, seek [00:14:00] counsel before making a decision.

Unfortunately, most employers are blindsided by retaliation complaint. I know employers sometimes accept Title VII complaints and think they knew it was coming, but the retaliation usually blindsides the employer because they don't necessarily believe that there's any connection between the action, or the complaint and the action.

And again, there are situations where an employee sensing a common adverse employment action will file some kind of complaint in an attempt to forestall that action. And courts can see that as well for what they are.

Jeff Stewart: And sometimes that complaint that they're filing is not necessarily a formal complaint.

It could be an email to their supervisor saying, "Hey, I think you are doing this wrong." Or, "I think I am being mistreated because of a disability, because [00:15:00] of my race, et cetera." And then they have some retaliation protections at that point, because they have expressed verbally, and again, in this case, in an email and opposition to an illegal practice, discrimination.

John Baker: Absolutely. Jeff, it doesn't have to be a formal charge. It can be something as simple as an email or something as difficult as a personal conversation, which is usually not documented. That's a more difficult situation.

The problem is, what draws the line between making some kind of comment or complaint and just having normal conversation in the workplace?

I'm afraid that because of the increase in retaliation charges filed with the EEOC, as you have indicated, it's going to further distill the relationship between employer and employee. It's going to become ultra-formal and maybe not the most [00:16:00] effective way for an employer to run it's business.

Jeff Stewart: Absolutely. And I know I've been contacted by employers who have received such an email and ask, all right, does this mean we can't fire somebody now? You know, because "hey, this person knew they were on the last straw. And then sent us this thing saying they believe they're being discriminated against. Does that mean we can't fire them without, you know, dealing with a retaliation?"

And, you know, as I've told them, you need to tread lightly because we need to look at things and what kind of documentation do you have for terminating this employee? Because if this employee is going to be terminated as part of a layoff that's been planned for weeks, and there's 20 people being laid off, I would tell you, "look, there's really very little risk because as long as you can show they were in that class of people to be laid off beforehand, you should be [00:17:00] fine."

If, on the other hand, you're terminating them because they were five minutes late and you've never fired somebody for being five minutes late before, you're going to run into a problem.

John Baker: Yeah, Jeff, I couldn't agree, couldn't agree with you more about this, but I'm going to take it a step further. For an employer to properly defend itself from a retaliation claim, it has to be proactive before there's any action taken by the employee.

So, what do I mean by that? You have an employee in your everyday HR function, there's a conversation with the employee that kind of is a performance improvement plan, we'll say. You document that. And you document everything that has to do with performance, we'll say. So then, when the time comes and some kind of complaint, whether it's formal or informal is filed, you can go back and you have documentation because courts have found that employer defenses,[00:18:00] essentially is we were going to fire this person anyway. That's great to say that, but it's even better to prove it. And you prove it by going back through your documentation and saying, well, here's what was going on.

Jeff Stewart: Absolutely. Those are great points, John. Now. let me shift gears a little bit here.

Normally when we think retaliation, it is decisions by management to do something, some form of adverse employment action. So, it's more of a management issue, and management have control there. But can coworkers retaliate against a fellow employee, John?

John Baker: It, it is conceivable that they can, the courts that have issued decisions on these types of cases, focus on whether the coworker is a decision maker, or contributes to the decision. [00:19:00] What the court's trying to get at was did the employer, as a legal entity, have knowledge of the complaint or the filing of a charge or something that the court have, or did the employer have knowledge of that? If it is a coworker that has no authority to hire or fire, it's less likely that the employer would be found liable for that.

Jeff Stewart: Yeah, my, my experience is it may be one piece of the plaintiff's claim. “Hey, I was harassed, teased, et cetera, by my coworkers.” But, unless there is that adverse employment action, which is determined by management, it's not going to rise to the level of retaliation. So John, with that all being said, how do you advise employers to [00:20:00] mitigate their risk?

John Baker: Important question, Jeff. I think I just alluded to documentation. So, we tell employers document, document, document, but sometimes that's not enough. First of all, the HR employees or any employee that serves a function of HR has to be trained how to document and what to document. In addition, supervisors and managers who may have that authority to terminate or the authority to issue some kind of adverse employment action or the authority to contribute to the decision for adverse employment action, they should be trained as well so that they know what the laws are saying and what the issues are.

Oftentimes we find an employer in any case, employer will have a great defense, but for one thing. And the one thing is a supervisor didn't follow his or her [00:21:00] training and did something outside of the box. So, we have those two things, document, training. A third factor would be anti-retaliation policy, so a policy should be carefully drafted to fit that particular employment situation, that particular industry, to make employees aware that there's an outlet for the employee to report anything situation that they feel is illegal or otherwise.

This policy should be published. If it's not a part of your current handbook, I would have them sign an acknowledgement that they received it. This is

important because if we get to a situation where we're in court and we have to defend this action, we can at least say, “oh, well, here's a policy that says that employee who has a problem has to come forward and tell us so that we're [00:22:00] aware of it. And this particular employee did not.”

So that's, that's why it's so important.

Jeff Stewart: Absolutely. And I would piggyback on that by saying anytime you're conducting any kind of internal investigation where you are interviewing people, both the complainant, respondent, any witnesses, you inform every one of those people that you have this anti retaliation policy, because the fact that they are involved in this investigation as a witness, that's protected activity. They have protections there and you want to let them know that if they feel in any way they're being retaliated against, that they let us know as management, because then we can address it.

And we also make sure that, you know, we have the opportunity to deal with it before it becomes a [00:23:00] legal claim.

John Baker: And that's the most important thing for, for employers. And that's, that's the issue we want to drive home to our employers in any area of employment law or labor law. And that is to stop litigation before it happens.

For the number one reason that it is so costly.

Jeff Stewart: Absolutely. So John, as we kind of wrap up our episode here today, I'd like to give all of our listeners a couple of key takeaways and I guess I'll go first. My first takeaway is train your managers. More than anything, first level supervisors, in particular, have the most influence on whether or not something is going to be retaliation.

You know, they usually know if a complaint has been made and they know that they need to be trained to take that up the line so that everyone is aware, “hey, some kind of protected [00:24:00] activity was engaged in or some kind of complaint was made so that we all know what we're dealing with. So, we make sure all of our documentation is in line.” And second, training our upper-level managers to ask questions before making adverse employment actions to make sure we're not stepping into a minefield of retaliation.

How about you, John? Do you have a key takeaway for our listeners?

John Baker: Well, you know what mine is, document. And then when you're done documenting, document some more.

You want to be able to show a court or a jury that you took the action seriously enough that in the past you have documented everything without any discrimination towards anybody. And you want to be able to show that you had no retaliatory motive. And the best way to do that is by documenting any performance issues, [00:25:00] anything that could lead to termination.

You can't go back and do it after you've forgotten to do it. So, document would be my number one takeaway.

Jeff Stewart: Absolutely. And I think that's a great way to end our episode. So, thank you, John. I want to, I want to thank all of our listeners for joining us on the Employment Law Counselor Podcast, where we try to make sense of the world of Labor and Employment Law.

On behalf of myself and John Baker, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends, and subscribe to the podcast. For more information on this and many other topics, please visit the White and Williams website at www.whiteandwilliams.com, where you can visit our blog and learn more about the firm.

Until next time, stay safe and stay compliant.

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