

RETALIATORY DISCHARGE AND PUBLIC-POLICY WHISTLEBLOWER LAWSUITS

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Retaliation and Title VII

- Retaliation against an individual because he filed a Title VII charge/lawsuit or because he opposed a discriminatory employment practice is unlawful.



What Actions Constitute Retaliation?

- In order to state a claim for retaliatory discharge, the plaintiff must show that:
 1. He engaged in protected activity
 2. His exercise of protected rights was known to defendant
 3. Defendant took adverse employment action, and
 4. There was a casual connection between the protected activity and the adverse employment action.

Retaliation Participation/Opposition Clause

- The opposition clause covers a broad array of activities, such as informal complaints.

Retaliation Participation/Opposition Clause

- The opposition clause protects employees who take no action to advance a position beyond disclosing it.

Adverse Employment Acts

- Adverse employment actions discourage employees from making or supporting charges of discrimination or unlawful conduct.

EMPLOYMENT AT WILL IN TENNESSEE: THE PUBLIC POLICY EXCEPTION

- One recognized exception to the at-will doctrine includes actions in violation of clear public policy evidenced in a constitutional, statutory, or regulatory provision.

Tennessee Statutory and Common-Law Retaliatory Discharge

- ❑ In 1984, the Tennessee Supreme Court *created* the tort of retaliatory discharge for filing a workers compensation claim.

Tennessee Statutory and Common-Law Retaliatory Discharge

- ❑ In 1986, the first TN retaliatory discharge action for filing a workers compensation claim was tried to a jury.

Tennessee Statutory and Common-Law Retaliatory Discharge

To establish a claim under Tennessee common law, the plaintiff must show that:

- 1) An employment at-will relationship existed,
- 2) He was discharged,
- 3) The reason for his discharge was the attempted exercise of a statutory or constitutional right, or for any other reason that violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision, and
- 4) A substantial factor in the defendant's reason for discharge was the exercise of a protected right or compliance with clear public policy (relating to safety, health, or the public welfare).

Tennessee Statutory and Common-Law Retaliatory Discharge

- The TN Supreme Court stated that the workers' compensation statute "[e]vidences a clear public policy that employees should be protected from having their employment terminated for asserting a worker's compensation claim."

Tennessee Statutory and Common-Law Retaliatory Discharge

- A plaintiff may file a suit for retaliatory discharge under the Tennessee Public Protection Act (“TPPA”) and/or under Tennessee common law.

Tennessee Statutory and Common-Law Retaliatory Discharge

To establish a claim under TPPA, the plaintiff must show:

- (1) his status as an employee of the defendant,
- (2) his refusal to participate in, or remain silent about, illegal activities,
- (3) his termination, and
- (4) an exclusive causal relationship between his refusal to participate or remain silent about illegal activities and his termination by defendant.

Retaliation & Whistleblowing

The Tennessee Public Protection Act

- No employee shall be discharged or terminated *solely* for refusing to participate in, or for refusing to remain silent about, illegal activities.

Retaliation & Whistleblowing

Any employee filing a cause of action for retaliatory discharge to cause needless costs to the employer, may incur sanctions including paying defendant's expenses.

Retaliation & Whistleblowing

- Disgruntled former officer of a medical group who was terminated due to his own bad behavior now claimed the termination was retaliatory in nature.

Mississippi Public Policy Torts

- Mississippi Supreme Court has carved out a *narrow* public policy exception to the employment-at-will doctrine.

The False Claims Act

- The Act provides for triple damages plus penalties from \$5,500 to \$11,000 per claim for anyone who knowingly submits or causes the submission of a fraudulent claim to the United States.

The False Claims Act

Medicare/Medicaid fraud examples:

- Services not rendered
- Upcoding schemes and unbundling
- Kickbacks & self-referrals
- Falsely certifying information
- Lack of medical necessity
- Fraudulent cost reports
- Grant or research fraud

The False Claims Act

- The Relator is protected from being retaliated against or fired for filing a qui tam complaint.

Fraud Enforcement and Recovery Act

- President Obama expands the scope of the False Claims Act via the Fraud Enforcement and Recovery Act of 2009.

Fraud Enforcement and Recovery Act

- The Attorney General may now delegate his authority to issue a CID and investigators may now share information with qui tam relators without substantial need.

Fraud Enforcement and Recovery Act

- The FERA now imposes liability on claims submitted to a non-government entity.

Fraud Enforcement and Recovery Act

- As long as funds are used to "advance a Government program or interest," any false claim made to a recipient of federal money will trigger FCA liability.

Fraud Enforcement and Recovery Act

- Whistleblower protections now extend beyond “employees” and protect any “contractor or agent.”

Protecting Your Company: Preventing Retaliation against a Whistleblower

- Implement training and policies that educate supervisors about retaliatory discharge claims.
- Have each attendee sign a form acknowledging that he/she has been told that the employer will not tolerate retaliatory conduct.

Protecting Your Company: Preventing Retaliation against a Whistleblower

- Include a “no retaliation” policy in the Employee Handbook.
- Management should encourage employees to complain if they believe they are being retaliated against.
- Management should tell employees that they may complain with no fear of retaliation.

Protecting Your Company: Preventing Retaliation against a Whistleblower

- When an employee complains, provide him with a written acknowledgement of his complaint.
- Investigate promptly, thoroughly, objectively, and in good faith.
- If remedial action is necessary, consider your options *carefully*.