



Spring 2020 Webinar Series

A Forward-Thinking Workforce and Workplace

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Retaliation: The Final Frontier

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Session Overview

- Identify key components of a retaliation claim
- Discuss common scenarios in the academe, challenging power dynamics, and tools to mitigate risk of retaliation
- Explore ways to impact cultural change, encourage reporting, and create supportive structures within your institution
- Anticipate what's next: an overview of trending state whistleblower laws

Elements of Retaliation Claim

Plaintiff must show:

1. They engaged in a protected activity
2. They suffered a material adverse employment action
3. A causal link between the protected activity and the materially adverse action

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)

Protected Activity: Participation Clause

- Requires some contact with a legal or administrative process (party or witness)
- Examples:
 - Raising a claim
 - Testifying
 - Assisting or participating in an investigation, proceeding, or hearing under EEO laws

Protected Activity: Opposition Clause

- Applies if an employee explicitly or implicitly communicates a belief that the matter complained of is, or could become, harassment or discrimination
- Manner of opposition must be based on a reasonable, good-faith belief that the conduct opposed is or could become unlawful
- Reasonableness is determined by a balancing test against the employer's legitimate demands for loyalty/cooperation in pursuit of a productive work environment

Examples of Protected Activity

- Filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- Communicating with a supervisor or manager about employment discrimination, including harassment
- Answering questions during an employer investigation of alleged harassment
- Refusing to follow an order that would result in discrimination
- Resisting sexual advances, or intervening to protect others
- Requesting accommodation of a disability or for a religious practice
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages

Adverse action

- Any adverse treatment that is reasonably likely to deter protected activity
- The “ultimate employment decision” standard limits retaliatory conduct to acts like hiring, granting leave, discharging, promoting, and compensating
- Examples of adverse action:
 - Transfers to a less desirable position, threats about reporting, verbal/physical abuse, spreading false rumors
- Examples that do not equate to an adverse action:
 - Reduced workload, negative employment reference, lateral transfers

Causation

- There must be a causal connection between the material adverse action and the employee's protected activity
- “But for” test (used by EEOC) requires the employee to prove it is more likely than not that but for a retaliatory motive, the employer would not have taken the adverse action
- Examples of evidence that can demonstrate causation:
 - Written or oral statement by the employer showing bias or retaliation was the reason for the action
 - Temporal connection between the protected activity and adverse action
 - Different treatment of the employee who engaged in protected activity from similarly situated employees who did not engage in protected activity
 - Inconsistent or shifting explanations of the reason for the adverse action

Case Scenario – Retaliation

Navigating the Retaliation Minefield

Report to Department Chair

Ashley, a student, tells the Department Chair that she's deeply troubled by something that one of her professors did but that she isn't comfortable sharing it unless the Department Chair can promise that it won't get back to the professor that she is the one who reported him. The Department Chair agrees to keep the student's identity confidential. Ashley then shows the Department Chair a recent Facebook post by Professor Jones.



Professor Jones

Yesterday at 2:55am · 🌐

Many don't seem to realize some of the unintended consequences of the #metoo movement. It appears that one of the hallmarks of our justice system – due process – is taking a back seat to the importance of believing the victim. As a white, male professor, it has certainly caused me to rethink how I interact with my female students. I am very reluctant to be in one-on-one settings with female students for fear that I will be falsely accused. I can't be the only male professor feeling this way. It won't surprise me if we see fewer male professor/female student mentorships and fewer female teaching assistants as a consequence of this shift from a presumption of innocence to a presumption of guilt.

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The Conversation Continues

The Department Chair thanks Ashley for bringing this to her attention and tells her that she'll take care of it.

Department Chair Emails Professor Jones

The Department Chair immediately emails Professor Jones:

I just finished a meeting with one of your female students in which she made me aware of your recent social media post. You need to be more thoughtful about what you post on social media, especially when you are friends with some of your students. This is discriminatory to our female students and will not be tolerated. Please let me know your availability to meet with me to discuss next steps.

Department Chair Emails Dean

Student Ashley Smith complained to me about a recent Facebook post by Professor Jones in which he says that he won't mentor female students or hire them to be his teaching assistant. This is outrageous. I've already reached out to him to set up a meeting to discuss this. He has become a real problem. He does not show up prepared to department meetings, students complain that he is not in his office during office hours published on his syllabi, and he regularly berates his TAs. If he doesn't get with the program, I think we should start talking with him about his retirement plans. This could certainly make our decision about whose position to eliminate a much easier decision. I'll let you know how our conversation goes.

Dean Forwards Email to the General Counsel

Can we please discuss? I need some help with the next steps.

E-Mail from the Dean to General Counsel

Hi,

After we talked, I went to the faculty member and reviewed this with him as a “teachable” moment. We looked at the social media post and I was diplomatic – I told him I knew he did not intend this, but that this might be perceived the wrong way. Given our values of inclusion and diversity, we want to avoid perception that he might disfavor women for mentoring opportunities.

He said he understood, and he later posted an apology on his social media page.

I thought we had a productive conversation, and this matter was resolved.

Then, the next day, I learned from another faculty member that he has gone around telling people that the Department Chair and I are harassing him and accusing me of age discrimination. What do I do now?

COUNSEL ADVICE?

E-Mail from Dean to General Counsel

I know we haven't had a chance to talk about my last e-mail, but wanted to add that the Director of Undergraduate Studies has come to me. Professor Jones cornered Ashley and asked her if she complained to me. Apparently she is the only female student who is his friend on Facebook. She was terrified and said he berated her. She is now fearful that this will affect her grades. She is upset because apparently the Chair told her that her complaint would stay confidential.

Let's catch up soon – this seems to be mushrooming.

COUNSEL ADVICE?

E-Mail from Dean to General Counsel

I took your advice and contacted the university's equity office and told them that a faculty member had complained that he was being discriminated against based on his age. They said they would contact him, inform him of our non-discrimination policy and investigate his complaint.

Then I contacted the faculty member and told him that it had come to my attention that he was complaining of discrimination and harassment. I told him that he had every right to pursue a complaint and the appropriate channel was the university's equity office. I also raised with him that he has to be mindful of retaliation and should not contact any individuals, whether students or employees, and ask them if they complained about the social media post. While I tried to protect the student and not identify her, he immediately realized his interaction with the student had come to my attention. He told me that the student had falsely accused him of sexual harassment and was trying to manipulate him to get a better grade. He said the student should be brought before the student conduct board for false and malicious allegations. He also said that there was no way I could be fair to him, and he needed to report to someone else.

Help!!

COUNSEL ADVICE??

Ashley Files Discrimination and Retaliation Complaint

The Dean learns from HR that Ashley filed a complaint of discrimination and retaliation. The complaint states that after she reported Professor Jones's Facebook post, he started picking on her in class and has given her nothing higher than a C on her last three assignments. After receiving the complaint, the Dean realizes that she never followed up to address Ashley's retaliation concerns.

Now what?

E-Mail from the Dean to General Counsel

Hi – me again. I know you had a lot to think about from our last call.

I need to let you know the latest: I got a call from the equity office and they said that Professor Jones contacted them and they told him they would investigate his complaint. He told them not to bother and that he had already been to the EEOC to file a complaint that he has been discriminated against based on his age.

We need to do something. His attitude isn't improving, and students aren't getting the support that they need to be successful. I know what you're going to ask. No. It's not documented, but everyone knows what he's like! Enrollment in his courses is suffering because the word is out about how tough he is to deal with.

That said, the department is in major turmoil. Students, parents and other faculty members are upset at the disruption. Professor Jones can no longer function effectively in this department. I had a conversation with the Chair. Professor Jones's contract expires at the end of this year, and the Chair wants to tell him that his contract will not be renewed. We need to cut some costs, and eliminating his position saves money, but does not impact course availability for students since other faculty members also teach Professor Jones's courses.

In the meantime, we have no choice but to remove him from teaching. We also really don't want him coming around the department. I know we will have to pay him.

If you have advice, I am all ears, but letting you know we have no choice if we want to keep this department from imploding.

COUNSEL ADVICE?

E-Mail from the Dean to General Counsel

SOS!

As we discussed, Professor Jones was informed that he was being relieved of his teaching duties effective immediately and that his contract would not be renewed for the fall 2020 semester.

I just learned that Professor Jones amended his EEOC charge to include a retaliation claim. I don't understand – we're still paying him and he said he was ready to retire!

Things were calming down, but now it seems like things are going from bad to worse. What should I do? Any advice on interacting with the faculty member since he is still around?

General Counsel E-Mail to Outside Counsel

Thanks for agreeing to defend us in this case. I am mainly worried about the retaliation claim. I know that the critical elements are: (1) the employee engaged in a protected activity (2) the employee suffered an adverse employment action and (3) there must be a causal link between the protected activity and the adverse action.

Do you think we have a basis for filing a motion to dismiss the retaliation claim?

Takeaways and Best Practices

- Address allegations of discrimination and harassment pro-actively
- Protection of Students, Employees from Retaliatory Actions by Supervisors, Faculty
- Document legitimate, non-discriminatory reasons for any actions taken regarding faculty member's employment conditions, change of duties, salary, etc.
- HR training of supervisor/personnel who interact with individual who has engaged in protected activity

Promoting Cultural Change

- Encourage Reporting
- Consider Creating a Stand-Alone Retaliation Policy
- Informal Resolution Options
- Peer to Peer Intervention

Anticipating What's Next: Trends in State Whistleblower Laws

- General trend to broaden protection for whistleblowers
- Examples of Legislation
 - Reducing burden an employee must meet to establish a claim
 - Expanding scope of disclosures constituting protected activity
 - Lengthening statute of limitations
 - Increasing employer notification obligations