

Retaliation - An Ongoing Concern

Employment law experts continue to warn about the retaliation “landmine” that is detonating in many workplaces. Employers such as the University are subject to a long list of statutes that provide protection for employees who feel they have experienced retaliation for exercising their rights. These statutes include Title VII, the Civil Rights Act, the Americans with Disabilities Act, the False Claims Act, the Equal Pay Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Uniformed Services Employment and Reemployment Rights Act, and others.

The scope of an employee’s protected activity (“exercising his/her rights”) has been broadly interpreted to encompass any conduct, in almost any form, that amounts to opposition to an employer’s policies or practices. Calling attention to unlawful employer activities, complaining about discriminatory treatment, or assisting another employee in asserting his/her rights may all qualify as protected activity. The Supreme Court has also taken an expansive view about what constitutes “retaliation,” holding that it includes any employer actions that “well might have dissuaded a reasonable worker” from engaging in protected activity. See *Burlington Northern & Sante Fe Railway Co. v. Smith*, 548 U.S. 53, 68 (2006). And the Court has recently ruled that, in connection with a Title VII retaliation suit, anyone within the “zone of interests” intended to be protected by the Title VII anti-retaliation provision may sue. This analysis was held to allow a male employee to sue for retaliation when he was terminated, even though he had not engaged in any protected activity, when the termination was regarded as aimed at punishing a female employee who was his fiancée and who had complained about sex discrimination by the employer. *Thompson v. North American Stainless LP*, 131 S. Ct. 863 (2011).

Retaliation claims continue to increase. In 2012, the Equal Employment Opportunity Commission reported more retaliation claims filed than any other type of discrimination claim. And once a retaliation claimant gets to court, an employer is subject to being held liable on two claims - one involving the original charge of, typically, discrimination, and the second involving retaliation. Ironically, the employer may, and often does, successfully defend the first, discrimination claim, only to lose and be subjected to a large damage verdict for retaliation. Though no unlawful discrimination was shown to have occurred, retaliation did, in the eyes of the jury, occur, and for that the employer must pay.

It is clear that employers must deal very carefully with an employee who has exercised a right under any of the statutes mentioned above. If a University official or supervisor has a question about these matters, contact should be made with the Office of Human Resources and the Office of Counsel.