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.
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.
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.