REVENGE AND THE WORKPLACE: RETALIATION EMPLOYMENT LAW ISSUES

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LBA CLE – JULY 26, 2011

I. Federal and Pennsylvania Employment Law Statutory Overview

A. Pennsylvania Human Relations Act (PHRA)

1. 43 P.S. §951 et seq.

2. State law on Employment Discrimination

3. Applies to employers with 4 or more employees

4. Covers discrimination based on race, color, religion, age, sex, national origin, and disability

5. Enforced by: the Pennsylvania Human Relations Commission (PHRC) and private right of action

6. Must exhaust administrative remedies no matter what

7. Statute of Limitations - 180 days after the alleged act of discrimination to file an administrative complaint with the Pennsylvania Human Relations Commission, 43 P.S. §959(h)

B. Civil Rights Act of 1964 (Title VII)

1. 42 U.S.C. § 2000e et seq.

2. Federal law on Employment Discrimination

3. Applies to employers with 15 or more employees

4. Covers discrimination based on race, color, religion, sex and national origin; 42 U.S.C. §2000e-2

5. Enforced by: (1) the Equal Employment Opportunity Commission (EEOC) for private employers; and the Department of Justice for public employers; and (2) private right of action

6. Must exhaust administrative remedies with EEOC no matter what

7. Statute of Limitations – must file administrative charge within 180 and up to 300 days of the discriminatory act. 42 U.S.C. § 2000e-5(e)(1) and 90 days to file suit from receipt of a right-to-sue letter, 42 U.S.C. §2000e-5(f)(1)

8. Anti-retaliation provision - 42 U.S.C. §2000e-3(a)

C. Age Discrimination in Employment Act (ADEA)

1. 29 U.S.C. §621 et seq.

2. Federal law prohibiting employment-based age discrimination

3. Covers employees 40 years or older

4. Applies to employers with 20 or more employees

5. Must exhaust administrative remedies no matter what

6. Statute of Limitations – must file administrative charge within 180 days and up to 300 days of the discriminatory act. 29 U.S.C. §626(d) and 90 days to file suit from receipt of a right-to-sue letter, 29 U.S.C. § 626(e)

7. Anti-retaliation provision - 29 U.S.C. §623(d)

D. Americans with Disabilities Act (Title I& II on employment)(ADA)

1. 42 U.S.C. §§ 12101-12214.

2. Federal law prohibiting employment based disability discrimination

3. Applies to employers with 15 or more employees.

4. Covers a "qualified individual with a disability"

5. Enforced by: (1) the EEOC for private employers; (2) the Department of Justice for claims against state or local government entities); and (3) private right of action

6. The ADA Amendments Act of 2008 (ADAAA) became effective 1/1/2009 and significantly broadens the ADA.

7. Statute of Limitations – must file an administrative charge within 180 and up to 300 days of the discriminatory act. 42 U.S.C. § 12117(a)(referring to Title VII procedures and remedies).

8. Anti-retaliation provision - 42 U.S.C. §12203(a)

E. Family Medical Leave Act (FMLA)

1. 29 U.S.C. § 2601 et seq.

2. Provides job security while an employee is off of work for a serious health condition or for a family member's serious health condition

3. Limited to 12 weeks per calendar year of protected time off

4. Enforced by: (1) the U.S. Department of Labor and (2) private right of action

5. Applies to employers with 50 or more employees

6. No administrative exhaustion requirement

7. Statute of Limitations - 2 years and 3 years for willful violations, 29 U.S.C. §§2617(c)(1) and (2)

8. Anti-retaliation provision - 29 U.S.C. §2615(a)(2)

F. Fair Labor Standards Act (FLSA)

1. 29 U.S.C. § 201 et seq.

2. Provides minimum wage and maximum hour protection for employees.

3. Enforced by (1) the Department of Labor and (2) private right of action

4. No administrative exhaustion requirement.

5. Statute of Limitations – 2 years and 3 years for willful violations, Oral v. Aydin Corp., 2001 U.S. Dist. LEXIS 20625 (E.D. Pa. Oct. 31, 2001).

6. Anti-retaliation provision – 29 U.S.C. §215(a)(3).

G. Equal Pay Act (EPA)

1. 29 U.S.C. §206(d)

2. Prohibits employers from unfair pay differentials because of sex (equal wages for equal work)

3. Strict liability applies (there is no intent required to discriminate, unlike Title VII

4. No administrative exhaustion requirement

5. Statute of Limitations – 2 years or 3 years if willful violation, 29 U.S.C. § 255(a)

6. Remedy: Back pay and equal amount of liquidated damages

H. Lilly Ledbetter Fair Pay Act (FPA) Fair Pay Act

1. 42 U.S.C. §2000e-5(e)(3)(A)(B).

2. Amends Title VII and overturned Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007)

3. Discrimination in compensation based on race, color, religion, sex and national origin

4. A discriminatory compensation decision occurs each time compensation is paid (the paycheck rule) or when the discriminatory policy is adopted or decision is made. 42 U.S.C. §2000e-5(e)(3)(A)

5. Relief may be obtained for up to two years before the filing of a discrimination charge

6. Enforced by EEOC

7. Statute of Limitations – must file administrative charge within 180 and up to 300 days of the discriminatory act. 42 U.S.C. § 2000e-5(e)(1)

I. Section 1981

1. 42 U.S.C. §1981

2. Federal law on racial discrimination in employment

3. Covers racial discrimination including national origin

4. Private right of action

5. No administrative exhaustion requirement

6. Statute of limitations - 2 years

J. Section 1983

1. 42 U.S.C. §1983

2. Federal law for an individual to enforce violations of federal constitutional rights against state actors

3. Public employees and employers (including school districts)

4. Private right of action

5. No administrative exhaustion requirement

6. Municipal Liability Claims

7. Statute of limitations - 2 years

K. Public Policy Wrongful Termination

1. State Common Law Claim

2. Discharges that threaten clear mandates of Pennsylvania public policy. See Clay v. Advanced Computer Applications, Inc., 522 Pa. 86, 88, 559 A.2d 917, 918 (1989).

3. A very limited exception to employment at will

4. No administrative exhaustion requirement

5. Examples: Highhouse v. Avery Transportation, 443 Pa. Super. 120, 660 A.2d 1374 (1995)(for filing an unemployment compensation claim); Kroen v. Bedway Security Agency, 430 Pa. Super. 83, 633 A.2d 628 (1993)(for refusing to take a polygraph).

6. Statute of limitations - 2 years

II. Context and History of Retaliation

A. Specific Provisions

STATUTE	SPECIFIC RETALIATION PROVISIONS
PHRA	43 P.S. § 955(d). "It shall be an unlawful practice…for any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.
TITLE VII	42 U.S.C. §2000e-3(a). "It shall be an unlawful employment practice for an employer to discriminate against any of his employees…because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."
ADA	42 U.S.C. §12203(a) and (b). (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act. (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.
ADEA	29 U.S.C. §623(d). "It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

FLSA	29 U.S.C. §215(a)(3) Prohibits the discharge of or discrimination in any manner against an employee: "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Fair Labor Standards Act], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee"
FMLA	29 U.S.C. §2615(a)(2). "It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual-- (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the [FMLA]; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the [FMLA]; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].
ERISA	29 U.S.C. § 1140. "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

B. Pennsylvania state law anti-retaliation is interpreted similarly to Title VII anti-retaliation.

See Fasold v. Justice, 409 F. 3d 178 (3d Cir. 2005)("the PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently") (quoting Fogleman v. Mercy Hosp., Inc. 283 F.3d 561, 567 (3d Cir. 2002)).

III. What Constitutes Protected Activity?

A. Supreme Court Cases

1. **Crawford** - Non-reporting employees asked questions in internal investigations can be retaliated against. Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tennessee (Metro), 555 U.S. 271, 129 S.ct. 846, 172 L. Ed. 2d 650 (2009).

2. **Kasten** – An oral complaint is protected conduct under the Fair Labor Standards Act. Kasten v. Saint-Gobain Performance Plastics, Co., 131 S. Ct. 1325, 1334, 179 L.Ed. 2d 379 (2011).

3. **Thompson** - An employee that does not engage in a protected act can have a cause of action but they must show they have an interest arguable sought to be protected by the statute. *Thompson v. North American Stainless, LP.,* 131 S. Ct. 863, 178 L.Ed. 2d 694 (2011).

B. Third Circuit

1. **Protected activity is defined by the applicable statute**

   a. An internal complaint is not legally sufficient protected activity for the anti-retaliation provisions of the ERISA Statute. Edwards v. A.H. Cornell & Sons, Inc. 610 F.3d 217 (3d Cir. 2010).

   b. To invoke the protection the Act employee must request leave under FMLA, not other leave, e.g. pregnancy leave. The Circuit Court interpreted the requirement that an employee "'take' FMLA leave to connote invocation of FMLA rights, not actual commencement of leave." Erdman v. Nationwide Insurance Company, 582 F.3d 500 (3d Cir. 2009).

   c. Although the Supreme Court did recognize a private cause of action under Title IX for disparate funding of women's programming in colleges, disparate treatment of coaches of women's teams based on disparate funding does not fall within the scope of Title VII. Atkinson v. Lafayette College, 460 F.3d 447 (3d Cir. 2006) citing Lamb-Bowman v. Delaware State University, 39 F. App'x 748, 750 (3d Cir. 2002).

2. **Protected Activity requires a good faith belief that an unlawful employment practice occurred.**

a. A request for an accommodation under the ADA requires the employee to have a reasonable good faith belief that he is entitled to an accommodation. Sulima v. Tobyhanna Army Depot, 602 F.3d 177 (3d Cir. 2010) (A morbidly obese employee took medication that resulted in frequent visits to the restroom. The employee knew that the condition was temporary and therefore did not affect a major life activity. The employee did not have a good faith belief he was disabled for the purposes of the ADA.).

b. An employee reporting unlawful employment practice does not need to be a member of a protected class, i.e. female, disabled, African American, to invoke the protections of the non-discrimination laws and have protection against retaliation. Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006).

3. **Protected activity does not need to be a formal complaint unless required by the overarching statute.**

a. Opposition" to discrimination can take the form of "informal protests of discriminatory employment practices, including making complaints to management. Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006) quoting Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 135 (3d Cir. 2006).

4. **Protected activity requires a opposition to an employment practice, not a general statement of rights based on a protected class.**

a. Protected activity requires three components: 1) the message must identify the employer's statement or context;2) the message conveyed does not need to be formal, but it must be a clear enough message that its expression is clearly understood; and 3) the message conveyed must one of opposition to the unlawful employment practice. Curay-Cramer v. Ursuline Acad. of Wilmington, Del., 450 F.3d 130 (3d Cir. 2006).

IV. What is Adverse Action for Retaliation Cases

A. Supreme Court - Burlington Northern v. White

Burlington Northern a 2006 U.S. Supreme Court case is the seminal case that deals with adverse action in the context of employment retaliation. Burlington Northern expanded what adverse action is. Adverse action is anything that will dissuade a reasonable plaintiff from engaging in protected activity. Adverse action is no longer limited to the terms and conditions of the employment relationship. What is materially adverse is what would dissuade a reasonable employee from engaging in protected activity. Burlington Northern v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).

B. Third Circuit

1. The adverse action must create more than trivial harm, such as a transfer to another station that does not change the commute time for the police officer. Estate of Oliva v. New Jersey, Dept. of Law & Pub. Safety, 604 F.3d 788 (3d Cir. 2010) (A section 1981 claim of retaliation applies the same standard as a Title VII case.)

2. An employer's decision not to renew an annual contract is an adverse action for the purposes of retaliation under the anti-retaliation provisions of Title VII. Wilkerson v. New Media Technology Charter School, 522 F.3d 315 (3d Cir. 2008)(A teacher who was under a regular contract for employment participated in a school event where she felt that the school was requiring her to worship ancestors rather than a Christian god. She complained and her contract for employment was not renewed).

3. Failure to promote an employee after she complains of sexual harassment can be an adverse employment action. Hare v. Potter, 220 Fed. Appx. 120 (3d Cir. 2007).

C. District Court Cases

1. What is enough for an FRCP 12(b)(6) Motion.

a. Employer opposes Unemployment Compensation benefits, for example employer provides inaccurate information to Unemployment Office.[1] Adamchik v. Compservices, Inc., 10-949, 2010 U.S. Dist. LEXIS 130133 (W.D. Pa. Dec. 9, 2010).

b. Changing of assignments that can be viewed as a demotion can be an adverse action. Baker-Bey v. Pa. Dep't of Corr., 06-C**V-**5490**,** 2008 U.S. Dist. LEXIS 56296 (E.D. Pa. July 23, 2008).

2. What is not enough for an FRCP 12(b)(6) Motion.

a. Interference with EEOC process is not an adverse action when employer complies with investigation of complaint. Adamchik v. Compservices, Inc., 10-949, 2010 U.S. Dist. LEXIS 130133 (W.D. Pa. Dec. 9, 2010).

b. Negative conditions/actions that occur prior to reporting discrimination are not adverse action for purposes of retaliation. Blake v. Penn State Univ., 09-1182, 2011 U.S. Dist. LEXIS 22928 (W.D. Pa. Mar. 8, 2011).

3. What is enough for an FRCP 56 Motion.

a. Employee's denial of working from home can be an adverse employment action. Yeager v. UPMC Horizon, 698 F. Supp. 2d 523 (W.D. Pa. 2010).

b. A denial of a re-appointment as a chair of a department is enough but the reduced duration is not enough. Tavana v. La Salle Univ., 06-cv-4376, 2007 U.S. Dist. LEXIS 85264 (E.D. Pa. Nov. 14, 2007).\

c. Inhabitable work environment, i.e., a leaky trailer without heat or power is an adverse employment action. Neal v. Daily's Juice, 07-1497, 2009 U.S. Dist. LEXIS 9962 (W.D. Pa. Feb. 10, 2009).

d. Employer's petition for revocation of a teaching certificate after the employment relationship ends is an adverse employment

[1] *See Grace v. Starwood Hotels & Resorts Worldwide, Inc*., 6-1203, 2008 U.S. Dist. LEXIS 10951 (W.D. Pa. Feb. 14, 2008). In *Grace*, the employer provided UC office with inaccurate information that got the employee in trouble.

action. Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994).

e. Threatened state action to arrest or detain is a triable fact for purposes of an adverse employment action (deputy put his hands on his holster). Counts v. Shinseki, 08-85, 2010 U.S. Dist. LEXIS 100439 (W.D. Pa., Sept. 23, 2010).

f. Unwarranted negative evaluation may be an adverse employment action. Estate of Oliva v. New Jersey, 579 F. Supp. 2d 643 (D.N.J. 2008). Estate of Oliva v. N.J., Dep't of Law & Pub. Safety, Div. of State Police, 604 F.3d 788 (3d Cir. N.J. 2010).

g. Negative employment references can be an adverse employment action. Gude v. Rockford Ctr., Inc., 699 F. Supp. 2d 671 (D. Del. 2010); See Farrell v. Planters Lifesavers Co., 206 F.3d 271, (3d Cir. 2000).[2]

h. Relocation to a distant office is enough. McGee v. P&G Distrib. Co., 445 F. Supp. 2d 481 (E.D. Pa. 2006). But see McKinnon v. Gonzales[3]

4. **What is not enough for an FRCP 56 Motion.**

a. Defective but repairable equipment like a broken air conditioner in a delivery truck is not enough for an adverse employment action in an FMLA case. Grosso v. Fed. Express Corp., 467 F. Supp. 2d 449 (E.D. Pa. 2006).

b. An employee being put on a Performance Improvement Plan if successfully completed cannot be considered an adverse employment action. Holliday v. Comcast Cable Communs., LLC, 05-2554, 2007 U.S. Dist. LEXIS 11468 (E.D. Pa. Feb. 16, 2007).

5. **What is enough for a FRCP 50 Judgment as a Matter of Law**

a. The employees who were reassigned and forced to use personal leave without pay without when there was an opportunity to make paid leave retroactive, suffered adverse employment action. Marthers v. Gonzales, 05-3778, 2008 U.S. Dist. LEXIS 42861 (E.D. Pa. May 30, 2008).

[2] In *Farrell*, an employee's supervisor made up negative employment references about the employee from other employee in order to have her terminated as a result of her turning down his sexual advances while on a business trip.

[3] Prison guard's transfer did not amount to adverse employment action where it did not result in a cut in pay or benefits or affect the employee's future career prospects. *McKinnon*

V. What is a Sufficient Causal Link for Retaliation Cases

A. Third Circuit Cases

1. A pattern of antagonism is sufficient to support a causal link between the protected activity and the adverse action.

   a. Failure to investigate allegations of vandalism and damage to a work station computer are sufficient to support the inference of a causal link. Marra v. Phila. Hous. Auth., 497 F.3d 286 (3d Cir. 2007).

   b. Excluding the employee from key meetings and reassigning key subordinates may be sufficient to support a causal link between the protected activity and the adverse action. Marra v. Phila. Hous. Auth., 497 F.3d 286 (3d Cir. 2007).

   c. A supervisor exhibiting a "look of disgust" after hearing the employee engaged in protected activity may be sufficient to support a causal link between the protected activity and the adverse action. Marra v. Phila. Hous. Auth., 497 F.3d 286 (3d Cir. 2007).

2. Statement showing animus on the part of the decision maker may be sufficient to support a causal link between the protected activity and the adverse action.

   a. The causal connection needed to prove discriminatory animus is amply exhibited where the employer stated they will make the plaintiff's life a living nightmare if they continue to accuse a supervisor of racism. This statement is particularly probative of discriminatory intent where the plaintiff did not bring the issue up to the employer before the employer made the statement. Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006).

3. Asserting inconsistent reasons for the adverse action is sufficient to support a causal link between the protected activity and the adverse action.

   b. The supervisor initially stated someone else was responsible for the decision to transfer the employee, where subsequently the supervisor admitted he was the final decision-maker. Marra v. Phila. Hous. Auth., 497 F.3d 286 (3d Cir. 2007).

4. Adverse action that happens shortly after the protected activity may be probative of a causal link.

   a. Nine months between the protected activity of testifying and the adverse action is not particularly probative of a causal link. Marra v. Phila. Hous. Auth., 497 F.3d 286 (3d Cir. 2007).

   b. A five-month time period between an informal complaint and the alleged adverse action is not enough to raise an inference of causation where there is nothing more. Andreoli v. Gates, 482 F.3d 641 (3d Cir. 2007).

5. Mixed-Motives Liability.

   a. A plaintiff can also proceed on a theory that an unlawful motive was a 'substantial motivating factor' in the adverse employment action. Shellenberger v. Summit Bancorp, Inc. 318 F.3d 183 (3d Cir. 2003).