Reducing Retaliation Claims Through Good Employment Practices

Webinar Offered by United Educators in Partnership With
The College and University Professional Association for
Human Resources (CUPA-HR)

Tuesday, Sept. 25, 2012
1 pm, ET
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Reference Materials

www.ue.org
Speaker Biographies

Jennifer Kirkland is associate general counsel at Washington and Lee University in Lexington, Va. She has practiced exclusively in education law and employment law for 20 years. Kirkland has taught courses in education law for the graduate education programs of the University of Virginia and George Mason University. She has presented at numerous programs on legal issues in education and employment sponsored by the National Association of College and University Attorneys (NACUA), United Educators, and other organizations. Kirkland received her undergraduate degree in music performance from Indiana University and her law degree from the University of Virginia.

Miriam J. McKendall is a partner with Holland & Knight in Boston. She co-chairs the firm’s Education Team and concentrates her practice in employment law, education law, and related litigation. She provides counseling and training of managers and administrators to higher education clients in employment-related issues, including harassment, discrimination, and retaliation. She also advises clients on developing workplace policies and preventive strategies to reduce employment claims, and represents them in federal and state courts. McKendall frequently presents and writes on employment compliance issues and is a member of NACUA. She received her undergraduate degree from Brown University and her law degree from Boston University School of Law.

Hillary Pettegrew (moderator) is a risk management counsel for United Educators and previously served as a UE claims counsel, handling many employee and student claims against UE members. Before joining UE, she was a writer/editor at Research Institute of America Group and practiced law at a Washington, D.C., law firm, where she focused on employment litigation. Pettegrew received her undergraduate degree from Colgate University and her law degree from Northwestern University School of Law.
Roundtable Agenda

I. Setting the Stage: Defining Retaliation
II. Implementing Policies Prohibiting Retaliation
III. Training Supervisors and Managers to Avoid Retaliation
IV. Responding Properly to Employee Complaints

Reference Materials
www.ue.org
Resources

UE Publications

  www.ue.org/Libraries/General_Purpose_Documents/Risk_Research_Bulletin_Beware_Retaliation_Against_Whistle-Blowers.--_2-11.sflb.ashx

- *Employment Action*, “Special Issue: Retaliation” (Fall 2003)
  www.ue.org/Libraries/General_Purpose_Documents/Employment_Action_Retaliation.--_Fall_2003_Vol_6_No_3.sflb.ashx

Washington and Lee University Materials

- www.wlu.edu/x32882.xml
  University policy on Prohibited Discrimination, Harassment, Sexual Misconduct, and Retaliation

- www.wlu.edu/documents/general_counsel/TitleIXatWLU.pdf
  Sex Discrimination, Harassment, Misconduct and Retaliation: Title IX at Washington and Lee University

- www.wlu.edu/x31879.xml
  Whistleblower Policy

- www.wlu.edu/x58773.xml
  September 2012 letter from President Ruscio to campus community highlighting the importance of the University’s Policies on Discrimination, Harassment, Sexual Misconduct, and Retaliation, as well as providing links to the policies and the procedures for filing complaints.

Other Sample Policies

Higher Education

- Appalachian State University
  http://policy.appstate.edu/Harassment_Discrimination_and_Retaliation
  Section 4.1 of the University’s Policy Manual specifically extends the prohibition on retaliation to protect “a complainant’s spouse, partner, or other close personal relation.”
New York University


NYU's “Non-Discrimination and Anti-Harassment Policy and Complaint Procedures for Employees” includes helpful definitions of prohibited discrimination, harassment, and retaliation and detailed instructions on how and where to report violations of the policy.

University of California, Santa Cruz

www2.ucsc.edu/title9-sh/retaliation.htm

“Retaliation—What Supervisors & Faculty Need to Remember About Retaliation” is a concise fact sheet about retaliation that other institutions could adapt as a handy reference guide for all supervisors.

University of California

http://ucwhistleblower.ucop.edu/faqb.html

This guide from the Office of the President, “Questions about protection from retaliation for being a whistleblower,” is a Q&A that explains to employees their rights under the university’s Whistleblower Protection Policy and what to do if they believe they have suffered retaliation for reporting a violation.

K-12 Schools

Herron High School (Indianapolis, IN)


Statements in the school’s 2012-13 Handbook prohibiting retaliation for reporting or participating in an investigation of discrimination or harassment are on page 15.

Milton Academy (Milton, MA)

www.milton.edu/about/upload/sexual_harassment.pdf

Milton’s policy against harassment states on page 4 that “[r]etaliation is a very serious, separate violation of this policy” and “will be subject to the same strict discipline as harassment itself.”

www.milton.edu/about/upload/whistle_blower.pdf

Milton’s policy on whistleblowing states that retaliation is not tolerated against anyone who brings a complaint in good faith, and will subject the employee who retaliates to discipline up to and including termination.
Sample “Global” Anti-retaliation Policies

- San Jacinto College
  www.sanjac.edu/protection-from-retaliation-for-reporting-suspected-wrongdoing

- University of Iowa
  www.uiowa.edu/~our/opmanual/ii/11.htm

- University of Notre Dame
  http://policy.nd.edu/policy_files/NonRetaliationPolicy.pdf
“Adverse” Actions for Retaliation Purposes in Education Cases

Adverse Action Found

Melie v. EVCI/TCI College Administration (SDNY 2009)
A jury could find that the plaintiff instructor’s removal as a soccer coach and as a college representative at open house events were materially adverse employment actions because he was paid for these activities.

Rehman v. State University of New York at Stony Brook (EDNY 2009)
Following his complaints, a medical school professor had numerous adverse employment actions occur:
- Equipment awarded him pursuant to a grant was removed from his laboratory
- Scheduling of his surgeries was disrupted
- He was not given time off to pursue research
- He was given a longer clinical assignment than other professors as well as one that was unpaid
- He was ignored by his supervisor at professional meetings
- He was excluded from participating in professional activities such as interviewing prospective faculty and residents

Barefield v. Board of Trustees of the California State University (E.D. Cal. 2007)
Giving a tenure track faculty member a negative evaluation and failing to invite her to attend the university’s anniversary ball were adverse employment actions.

Note: Juries and courts are more likely to view an action as being retaliatory than discriminatory. The same action that is found not to constitute discrimination can be found to constitute retaliation, especially when it occurs close on the heels of an employee’s engaging in a protected activity.

No Adverse Action Found

Lockridge v. University of Maine System (1st Cir. 2010)
After a tenured professor filed a sex discrimination complaint with a state agency, her request to transfer to an open office in a more central building was denied and the office was given to a less senior faculty member. The court held that this did not constitute an adverse employment action because other professors more senior than plaintiff were similarly housed in the satellite office.
Recio v. Creighton University (8th Cir. 2008)

Although a failure to be assigned to teach advanced classes can be a materially adverse employment action, the following allegations made by the plaintiff language professor were “trivial”:

- There was a two-month delay in notifying her of a teaching vacancy
- She was required to acknowledge her probationary status in her employment contract
- She was denied the opportunity to participate in a study program in Spain
- She (along with her coworkers) was forced to work a MWF schedule in the spring semester when she would have preferred a TTH schedule
- She was excluded from a picture of the faculty that was posted on the website
- The temperature setting in her office was too cold

Somoza v. University of Denver (10th Cir. 2008)

The plaintiff Spanish professors did not suffer adverse employment actions when their colleagues rolled their eyes, made comments to one another, and laughed at their opinions when they spoke at a meeting. The court noted that the plaintiffs “may have had to withstand colleagues that do not like them, are rude, and may be generally disagreeable people,” but pointed out that it was not the court’s duty to “mandate that certain individuals work on their interpersonal skills and cease engaging in inter-departmental personality conflicts.”

Note: While acts viewed in isolation may seem trivial, they can become problematic when included in a litany of “adverse” acts. Sometimes the sheer number of acts cited can create an inference of retaliation. Be realistic in assessing the overall impact of a series of seemingly trivial actions.
Sample Verdicts and Settlements in Retaliation Cases Against Educational Institutions

2012 – Daytona State College paid over $300,000 to settle a lawsuit claiming sexual harassment, hostile work environment, and retaliation. Beginning in 2008, the female plaintiff made 10 separate complaints to college officials, alleging that she had received poor evaluations for the 2007-2008 school year and was placed on a performance improvement plan in retaliation for complaining.

2012 – A jury rejected her claims of sex discrimination but awarded the former headmaster of Christ Academy $100,000 after finding that she had been terminated in retaliation for her difficulties with the male athletic director, whom she contemplated firing. A major donor had threatened to withhold funding if that happened.

2012 – A former employee of Iowa State University’s College of Engineering was awarded over $1 million under the state’s whistleblower protection law. He had sued for intentional infliction of emotional distress and retaliation when his duties and pay were changed and he was ultimately fired following a reorganization. He had told the university that the director of the marketing department, who later pled guilty to theft, had engaged in financial and other misconduct.

2012 – Washington State University paid $650,000, agreed to EEOC monitoring for two years, and implemented a mandatory anti-discrimination program to resolve claims that a married Chinese couple who conducted research was subjected to discrimination and retaliation by their lab supervisor.

2012 – A federal appeals court upheld a jury’s award of more than $400,000 in back pay to an Egyptian-born Muslim doctor who claimed that the University of Texas Southwestern Medical Center (UTSW) had retaliated against him by causing another employer to withdraw its job offer to him. In his resignation letter, the doctor had cited discrimination and harassment by his supervisor as his primary reason for leaving UTSW.

2011 – New York University agreed to pay an employee $210,000 and to implement enhanced university-wide harassment and retaliation policies, complaint procedures, and training. The African-born employee claimed that he had been subjected to a hostile work environment that included his supervisor regularly addressing him as “monkey” and “gorilla,” asking if he wanted a banana, and expressing hostility toward immigrants. The employee claimed the university waited for months to investigate his complaints and took virtually no corrective action after learning the employee’s supervisor had retaliated against him by fabricating grounds for discipline.

2011 – After the judge dismissed a former professor’s claims of religious discrimination, the jury found that a dean at Milwaukee Area Technical College had retaliated against the plaintiff professor for complaining about discrimination and awarded him approximately $1 million.

2011 – A jury awarded the former women’s basketball coach at Texas Southern University $730,000 in her lawsuit alleging that she was demoted and terminated because of sex discrimination and in retaliation for complaining that she was paid less than the men’s coach.
2010 – A jury awarded a former long-term employee of the Nashville public schools approximately $1.5 million in her lawsuit alleging that she was fired in retaliation for having provided corroborating evidence in the internal investigation of another employee’s sexual harassment allegations.

2010 – A federal jury awarded over $360,000 to a former chief of staff in the Kansas City school district who resigned because of his retaliatory treatment by the former superintendent after the plaintiff objected to the superintendent allegedly making discriminatory and degrading comments about other district employees.

2010 – A jury awarded $545,000 to the former women’s basketball coach at Clark College who claimed he was terminated in retaliation for having expressed concern about compliance with Title IX.

2009 – The University of California, Berkeley paid $3.5 million in settlement to a former swimming coach and athletic administrator who had sued for retaliation, claiming she was fired for complaining about the treatment of women by the athletic department. The plaintiff was also reinstated.

2008 – Florida Gulf Coast University paid over $4 million to 3 plaintiffs, including the former women’s golf and volleyball coaches, to settle their claims of retaliation for complaining about gender inequity in athletics.

2008 – Fresno State paid a $9 million settlement to a former basketball coach who sued claiming she was fired in retaliation for objecting to sexual harassment and discrimination in the athletic department. The settlement followed a $19.1 million jury verdict for the coach.

2008 – Following a 2007 jury verdict of almost $6 million, Fresno State paid over $5 million to settle a retaliation lawsuit filed by a former volleyball coach who was fired after advocating for gender equity in athletics.

2008 – While a jury was considering whether to award punitive damages after finding in the plaintiff’s favor on his claim that he was fired in retaliation for having expressed concern over unequal pay for female employees, Lake Ridge Academy agreed to settle for $950,000.

2007 – Fresno State paid $3.5 million to settle a lawsuit by former associate athletic director who claimed she was fired in retaliation for advocating for gender equity in athletics.
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