



Laura A. Pfeiffer

RETALIATION CLAIMS ON THE RISE WHAT CAN EMPLOYERS DO ABOUT IT?

with special guest Justice Ericson Lindell

(612) 604-6685

lpfeiffer@winthrop.com



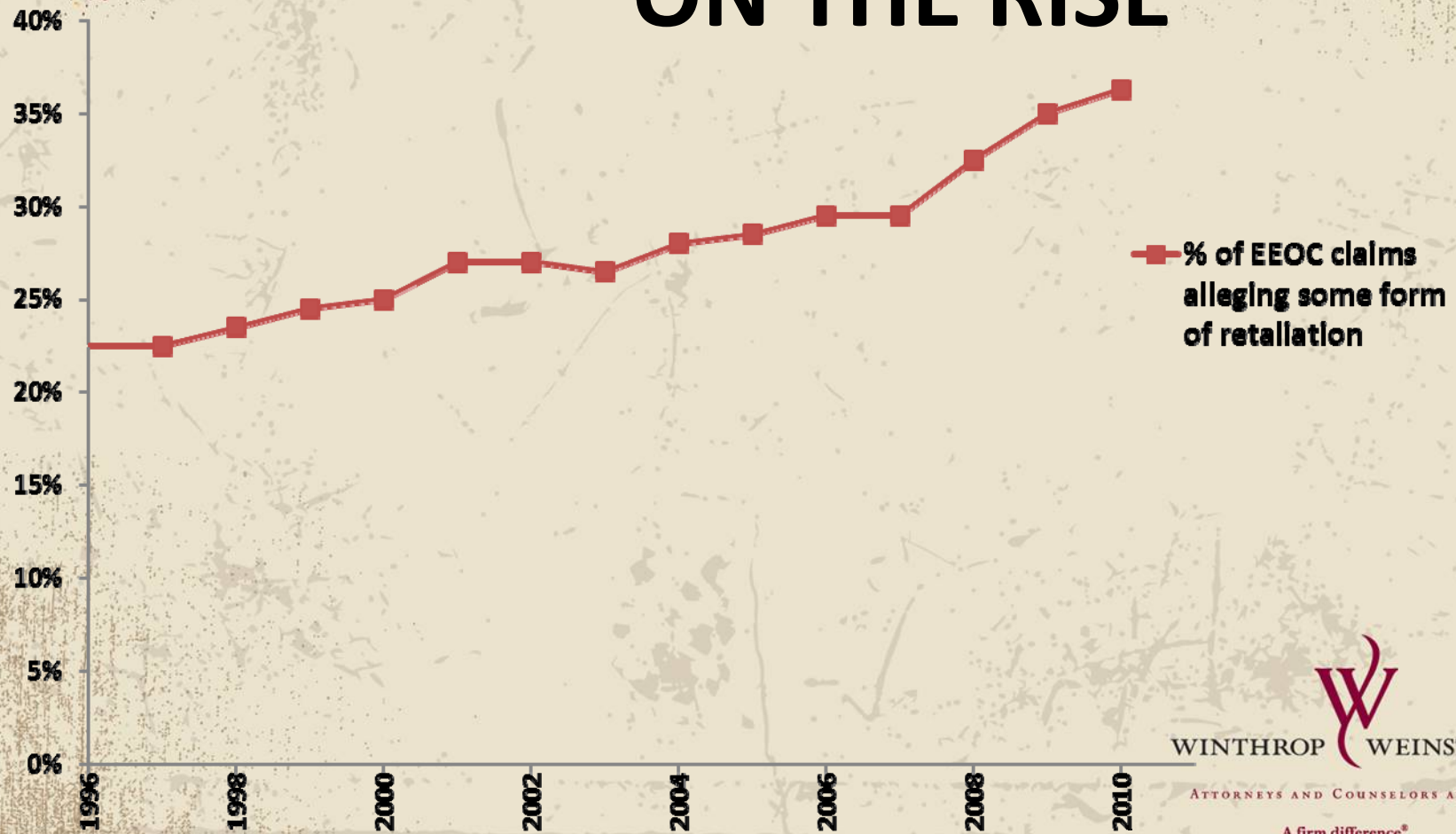
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RETALIATION CLAIMS ON THE RISE




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TITLE VII

Title VII, which prohibits discrimination based on race, color, sex, national origin, or religion, also provides that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . .

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.*

42 U.S.C. § 2000e-3



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MINNESOTA HUMAN RIGHTS ACT

It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a perpetrator, employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson, or employee or agent thereof to intentionally engage in any reprisal against any person because that person:



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MINNESOTA HUMAN RIGHTS ACT

- 1) *opposed* a practice forbidden under this chapter or has *filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter*; or
- 2) *associated with* a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin.



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MINNESOTA HUMAN RIGHTS ACT

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2); *refuse to hire* the individual; *depart from* any customary employment practice; *transfer or assign the individual to a lesser position* in terms of wages, hours, job classification, job security, or other employment status; or *inform another employer* that the individual has engaged in the activities listed in clause (1) or (2).

Minn. Stat. § 363A.15.



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MINNESOTA WHISTLEBLOWER ACT

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location nor privileges of employment because:

1)the employee, or a person acting on behalf of an employee, in *good faith, reports a violation or suspected violation of any federal or state law* or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;



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MINNESOTA WHISTLEBLOWER ACT

- 2) the employee is requested by a public body or office to *participate in an investigation*, hearing, inquiry;
- 3) the employee *refuses an employer's order* to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;



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MINNESOTA WHISTLEBLOWER ACT

- 4) the employee, in good faith, reports a situation in which the quality of health care services provided by a *health care facility*, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm; or
- 5) a *public employee* communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official.

Minn. Stat. § 181.932, subd. 1.



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COMMON LAW WRONGFUL DISCHARGE

Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987).

- In Phipps, the employee was instructed to put *leaded gasoline* into a car that only took unleaded gasoline. *Employee refused on the grounds that doing so would be unlawful*, and he was fired.
- The Court of Appeals held that the employee was wrongfully terminated because the termination violated “a clear mandate of federal policy.” The Minnesota Supreme Court affirmed.
- In 2006, the Minnesota Supreme Court held that the Whistleblower Act (Minn. Stat. § 181.932) *does not preclude the common law tort for wrongful discharge for refusal to perform an unlawful act.*



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Thompson v. N. Am. Stainless, LP,
131 S. Ct. 863 (2011)

- Plaintiff claimed he was fired because his fiancée (who worked at the same place) filed a charge of discrimination with the EEOC.
- The Supreme Court concluded that Title VII's anti-retaliation provision "must be construed to cover a broad range of employer conduct."

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Thompson v. N. Am. Stainless, LP (cont.)

- The Court stated that Title VII’s anti-retaliation provision prohibits conduct that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. We think it obvious that a reasonable worker might be dissuaded from engaging in a protected activity if she knew her fiancée would be fired.”
- The Court rejected the invitation to define a “fixed class of relationships for which third-party reprisals are unlawful,” recognizing the ends of the spectrum (a close family member versus a “mere acquaintance”).

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Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846 (2009)

- During the course of an investigation into another employee's harassment complaint, the plaintiff revealed that *she also was a possible victim of harassment.*
- Plaintiff was then *terminated for "embezzlement,"* and she filed a claim of retaliation.
- The Court held that *Title VII's anti-retaliation provisions protect an employee in that situation,* even if the employee did not initiate the investigation and never filed a formal charge of harassment.

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Kasten v. St.-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011)

- In the FLSA context, the Court recently held that “[t]o fall within the scope of the [FLSA] anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights and a call for their protection. *This standard can be met, however, by oral complaints as well as by written ones.*” (emphasis added)
- The Court declined to address the issue of whether complaints made to private employers, rather than government agencies, are protected under the FLSA’s anti-retaliation provision.



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Bahr v. Capella Univ., 788 N.W.2d 76 (Minn. 2010)

- Plaintiff claimed she was fired from her position in retaliation for her *opposition of her employer's unlawful discrimination* against another employee.
- The plaintiff alleged that the fact that her *employer did not place an African-American employee on a performance improvement plan* despite the plaintiff/supervisor's recommendation, was an *unlawful act under the MHRA*.
- The Minnesota Supreme Court concluded that even under the good-faith, reasonable-belief "standard" *the plaintiff's claim failed*.
- Without an *adverse employment action* there cannot be a *discriminatory practice in violation of the MHRA*, and thus, no retaliation for opposition to such a practice.



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

- Retaliation occurs whenever an employer takes a materially adverse action; *i.e., any action that “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”*
- Does not *need to be an ultimate employment action* such as hiring, firing or promotion.

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RETALIATION CLAIMS ON THE RISE
WHAT CAN EMPLOYERS DO ABOUT IT?

Practice Pointer:

- Implement and follow an anti-retaliation policy.

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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Train your managers on what constitutes retaliation, how to respond to a claim of retaliation, and how to document. Retaliation can sometimes be subtle.

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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Document, document, document. But remember, bad documentation is worse than no documentation, and resist the urge to over-document. Ensure your documentation is consistent with past practice and that it is timely and accurate.



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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Promptly investigate all employee complaints and take appropriate action.



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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Only provide information to other employees on a need-to-know basis.

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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Follow-up with the complainant to determine if there are any further incidents or other problems. Multiple meetings may be necessary. Do not ignore the complainant.



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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Consider whether there is an ability to distance the involved parties or restructure the environment by way of transfer, change in supervision, etc. But be careful that the changes do not appear retaliatory. Obtain sign-off by the complainant if a change is made so the change itself cannot be argued to constitute retaliation.



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RETALIATION CLAIMS ON THE RISE

WHAT CAN EMPLOYERS DO ABOUT IT?

Practice Pointer:

- Before taking any significant employment action against a complainant, carefully review the timeline, including all documentation, to determine proximity to a possible retaliation complaint and intervening events. Timing is critical.



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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Consider having a party with no knowledge of the complaint review the decision when considering an adverse action. An additional level of review can sometimes help to insulate an employer.



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RETALIATION CLAIMS ON THE RISE *WHAT CAN EMPLOYERS DO ABOUT IT?*

Practice Pointer:

- Consider paying an employee severance to reduce exposure in appropriate circumstances.



VIGNETTES

Presented by:

Laura A. Pfeiffer

&

Justice Ericson Lindell

(612) 604-6685

(612) 604-6431

lpfeiffer@winthrop.com

jlindell@winthrop.com



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