

*Are We Really Through With This
Employee: Releases in Severance
Agreements and Retaliation Claims*

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The Definition of Retaliation

An adverse employment action based on an employee's protected activity.

The Employer's Challenge

Some key terms---Proof of a Retaliation Claim-

- × if an individual engages in "protected activity"
 - × suffers "an adverse employment action"
 - × establishes "causation"
 - × retaliation is proven, *even where the underlying discrimination claim is not established*
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Element One: Protected Activity

- An employee who participates in any manner in an investigation, proceeding or hearing is *protected*
 - Participation in protected activity
Includes:
 - Filing a charge of discrimination
 - Assisting in the enforcement of anti-discrimination laws
 - Opposing unlawful practices
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The Second Element: Adverse Employment Action

Taking an adverse employment action against employees engaging in protected activity is *prohibited*.

What is a materially adverse action?

Former analysis:

- Generally, courts required a tangible, materially adverse employment action motivated by retaliatory animus
 - “Ultimate” employment actions had to be affected, e.g.:
 - hiring
 - firing
 - disciplining
 - failing to promote
 - failing to compensate fairly
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Burlington Northern & Santa Fe Railway v. White

- White assigned to forklift duties
 - White complained about harassment by supervisor
 - White removed from forklift duties and assigned more arduous duties
 - White filed EEOC Charges, including two for retaliation—change of duties and surveillance
 - Company suspended White and then reinstated her with full back pay
 - White filed retaliation charge for suspension
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Burlington

The Court's findings:

- White prevailed on her retaliation claims *for both the job duty reassignment and the suspension without pay, even though reinstated with pay.*
 - These actions were deemed *materially adverse to a reasonable employee, i.e., they were "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."*
 - The Court focused on facts --these actions were not trivial harms (e.g., petty slights, minor annoyances and simple lack of good manners) associated with the workplace.
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Burlington Northern & Santa Fe Railway v. White

Expands the definition of an adverse employment action to:

- Any action toward an employee that would deter a "reasonable person" from making or supporting a charge of discrimination
 - This test could even apply to actions by a manager that occur outside of the workplace, as long as those actions would deter a reasonable person
 - Requires analyzing the context, including the proximity, of an employment action, to determine whether a reasonable person would feel that it is adverse.
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So...Just What Exactly Constitutes Retaliation?

- In the wake of *Burlington*, courts have applied the new standard for “adverse action” in various contexts and to claims of retaliation under many state and federal laws
 - Remember: the inquiry into what constitutes an “adverse action” is *highly fact-specific*
 - as a result, the *same action* could be prohibited in one case and permissible in another
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Other employment actions deemed to be actionable are:

- Delay in reinstatement
 - Disadvantageous transfer/ assignment
 - Demotion
 - Suspension
 - Constructive discharge
 - Unfavorable job evaluations
 - Reprimands
 - Denial of tenure
 - Denial of overtime
 - Refusal to transfer
 - Refusal to give deserved pay raise/bonus
 - Filing a counterclaim
 - Removal as a Shop Steward
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Examples of Actions Found Not to Constitute "Adverse Action"

- ✘ A 7-day suspension where the employee was allowed to continue working and his pay was not reduced, and the suspension was later rescinded.
 - ✘ The refusal to relocate an employee from a cubicle to an enclosed office.
 - ✘ Poor treatment, "snubbing," "cold shoulder" by supervisors and co-workers.
 - ✘ Removal from the employee's position where the duties remained the same but the work hours changed.
 - ✘ Reposting of the employee's position while she was out on leave.
 - ✘ Loss of responsibility for 2 investigations, exclusion from some meetings, and denial of a raise.
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The Third Element – Causation

- Employee must show that protected activity caused the adverse employment action
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Causation -- Direct Evidence

- Example: Documentation of retaliatory motives for adverse employment action
 - "Smoking gun" evidence not usual
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Causation – Circumstantial Evidence

- Protected activity followed closely by adverse employment action
 - The closer in time, the stronger the inference of retaliation
 - Evidence of inconsistent methods of discipline or haphazard application of work rules.
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The Severance Agreement Debate

- Agreement provides that severance pay is conditioned on employee signing release of all claims
 - Release includes prohibition against filing a Charge of Discrimination with EEOC and withdrawing any previously filed Charge
 - Is this retaliatory?
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EEOC v. Lockheed Martin

- ✓ Laid off employees offered severance benefits
 - ✓ Required to sign release of claims, including waiver of right to file EEOC Charge in exchange for severance benefits
 - ✓ Laid off employee filed Charge after offer but before acceptance
 - ✓ Told must withdraw Charge to receive benefits
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EEOC v. Lockheed Martin

- ✓ Conditioning receipt of severance pay on withdrawal of charge or refusal to permit charge filing *is* retaliatory
 - ✓ Adverse action found in not giving the employee severance benefits
 - ✓ Employee confronted with Hobson's choice: she could withdraw her EEOC Charge or she could forfeit her severance benefits
 - ✓ The act of denying employee severance benefits followed her filing of the EEOC Charge and was the result of her failure to drop the EEOC claims
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EEOC v. SunDance

- ✘ Court *reversed* lower court's ruling that severance agreement that conditions severance pay on a promise not to file an EEOC Charge constitutes facial retaliation under the anti-retaliation provisions
 - ✘ Employer did not take any adverse action--rather, merely offered employee a contract
 - ✘ But held — waiver of the right to file a charge is void as against public policy. The purpose of the charge is to inform the EEOC of possible discrimination, not to recover damages from employer
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EEOC v. SunDance

- While employee could not waive right to file charge, can waive right to recover damages in her own lawsuit
 - Employee can waive claim to bring a discrimination lawsuit, provided that s/he does so knowingly and intelligently
 - Court rejected EEOC's claim that the Separation Agreement in and of itself is retaliatory because such agreements may chill employee's willingness to participate in EEOC proceedings
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EEOC v. SunDance

Mere offer of agreement to all RIF'ed employees is not facially retaliatory. Language does not prevent mere participation in EEOC proceedings, and, if does, is unenforceable, but its inclusion in agreement does not make offer of agreement retaliatory

Suggestions

- Review Severance Agreements and Plans
 - Remove prohibition about filing EEOC charge
 - Include provision that employee shall not seek, accept or be entitled to any monetary relief arising from any EEOC charge
 - Include provision re: govt. agency may pursue claims but Agreement provides exclusive remedy to employee
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EEOC Charge

Notwithstanding the foregoing, nothing contained herein shall prevent Employee from filing an administrative charge of discrimination with the EEOC or state or local fair employment practices agency. Employee agrees that he shall not seek, accept, be entitled to any monetary relief, whether for himself individually or as a member of a class or group, arising from an EEOC charge filed by Employee or on his behalf. This Agreement prohibits Employee's ability to pursue any Claims against the Released Parties seeking monetary relief or other remedies for himself and/or as a representative on behalf of others.

Government Agency Clause

No federal, state or local government agency is a party to this Agreement and none of the provisions of this Agreement restrict or in any way affect a government agency's authority to investigate or seek relief in connection with any of the Claims released. However, if a government agency were to pursue any matters falling within the Claims, which it is free to do, Employee and the Company agree that this Agreement shall control as the exclusive remedy and full settlement of all Claims between Employee and the Released Parties. The Agreement is binding as between two private parties, the Company and Employee. Therefore, this Agreement affects the two parties' rights only, with no impact or restrictions on any third parties, including any government agency.

Multi-State Operations

- Review agreements and applicable state law
 - Make state-specific
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OWBPA Concerns

- 21/45 days to review/7 days to revoke
 - Consideration for waiving ADEA claims and beyond what otherwise is due employee
 - Advise employee in writing of right to consult counsel
 - If offered in connection with exit incentive or other employment termination program offered to a group of employee, must inform employees in writing:
 - Eligibility factors and any applicable time limits
 - the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program
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OWBPA Concerns

If employee challenges validity of waiver of age discrimination claims under the ADEA and/or the OWBPA cannot require return of benefits. However, should state company reserves rights to restitution, recoupment or setoff should a challenge to the age discrimination waiver prove successful.

Additional Concerns

- Severance plans—require release as condition to receiving severance
 - Continued employment after sign agreement
 - Include fact in agreement
 - Provide requirement that employee signs second release at end of employment
 - Ensure consideration for second release
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Continued Employment

In consideration of your execution of this Agreement and your execution of the Second Release of Claims attached to this Agreement as Appendix A (the "Second Release"), the Company will pay you a lump sum payment in the amount of One Hundred Thousand dollars (\$100,000) (the "Lump Sum Payment"), less tax and other legal withholdings. The Company will pay you the first one-half of the Lump Sum Payment (the "First Lump Sum Payment"), Fifty Thousand dollars (\$50,000.00) no earlier than June 1, 2007 and no later than June 12, 2007. Within ten (10) business days following the Second Release Effective Date, the Corporation will pay you the second one-half of the Lump Sum Payment (the "Second Lump Sum Payment"), Fifty Thousand dollars (\$50,000.00).
