




When It's Over:
Employment Laws for Employee Departures

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True or False?

The only employees who can sue for retaliation are those who personally complain about or engage in protected activity.

Did You Know?

38%

Out of the 99,412 charges of discrimination filed with the U.S. Equal Employment Opportunity Commission, 38 percent involved retaliation claims? (The highest percentage of any category of claims filed.)

Source: <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

True or False?

If an employee sues for both sexual harassment and retaliation (for making a harassment complaint), the employee has to prove that she or he was sexually harassed to succeed on the retaliation claim.



AGENDA

- Retaliation Claims
- Due Process Rights
- Other Termination-Related Issues
- When Someone Wants to Know About Your Former Employees



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RETALIATION CLAIMS



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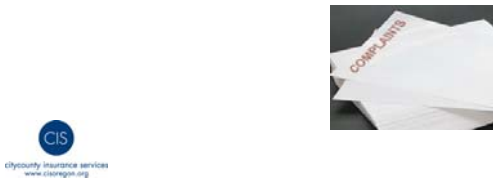
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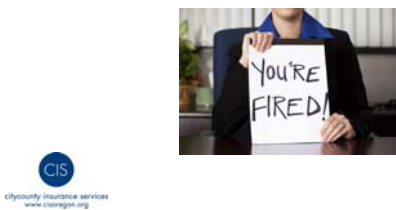
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True or False?

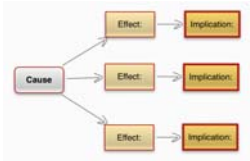
Retaliatory acts (also known as “adverse employment actions”) must be obvious, severe acts that cause the employee to lose money or be fired.



Retaliation Claims: When an Employee Gets to the Jury

1. Employee's burden to prove:

- “Protected protests” or “protected conduct”
- Adverse action
- Causal connection



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Retaliation Claims: When an Employee Gets to the Jury, *cont'd*

2. Employer's burden to prove:

- Legitimate, non-discriminatory reason for adverse action, such as:
 - Employee didn't make the complaint in good faith
 - Decision-maker didn't know about the underlying protected activity
 - The “adverse action” wasn't a material action that would deter others from engaging in protected activity

3. Employee's burden to prove:

- Employer's stated reason is a pretext for retaliation



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Retaliation Claims: When an Employee Gets to the Jury, *continued*

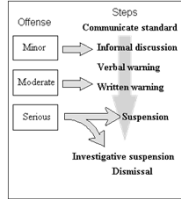
- How an employee “proves” pretext (what the judge or jury will look/listen for):
 - Direct evidence (*i.e.*, the smoking gun admission)
 - Indirect evidence, such as timing
 - Evidence that the reason offered by the employer is a lie/cover-up



Retaliation Claims: When an Employee Gets to the Jury, *cont'd*

- How an employee “proves” pretext (what the judge or jury will look/listen for):

- Evidence that others who committed the same “infraction”, but had not engaged in protected activity, were not disciplined/discharged
- Evidence that the employer advanced inconsistent, multiple or no reasons to justify the discipline/discharge



Kasten v. Saint-Gobain Performance Plastics (U.S. Supreme Court 2011)

Holding: Employees who make oral complaints about wage and hour issues are protected under the Fair Labor Standards Act (“FLSA”).

- How can you tell when an employee makes a “complaint”?
 - When “a reasonable, objective person” concludes the employee made a comment sufficient to put the employer on notice that the employee is asserting FLSA rights.

Kasten v. Saint-Gobain Performance Plastics (U.S. Supreme Court 2011)

- How can you tell when an employee makes a “complaint”? (*continued*)
 - 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 protected by the statute and a call for their protection.

Kasten v. Saint-Gobain Performance Plastics (U.S. Supreme Court 2011)

➤ Key Takeaway

- The Court's ruling significantly expanded the potential for retaliation suits against employers.
- What Should an Employer Do Now?
 - Take internal complaints seriously and be in a position to defend discipline, reassignment, and termination decisions



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Thompson v. North American Stainless, LP (U.S. Supreme Court 2011)

- Employee/plaintiff claimed he was fired because his fiancée filed a sex discrimination charge with the EEOC
- Two lower courts found that Thompson could not sue because he had not engaged in an activity that Title VII protects – he had not been fired after complaining about discrimination himself or otherwise engaged in protected activity
- U.S. Supreme Court: Thompson may sue because he is in the “zone of interests” protected by Title VII
 - This is true even if the employee does not directly engage in a “protected activity” (e.g., complaints of workplace discrimination or harassment)



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Thompson v. No. American Stainless, LP (U.S. Supreme Court 2011)

➤ Key Takeaways

1. Defining the “zone of interests”
 - Family Members—“almost always”
 - Mere Acquaintance—“almost never”
 - Supreme Court: “We decline to identify a fixed class of relationships for which third-party reprisals are unlawful.”
2. Other retaliation defenses still apply



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Some Other Ways Federal and Oregon Law Protects Employees

- Requesting a reasonable accommodation (Americans With Disabilities Act and Oregon law)
- Filing for a benefit (ERISA)
- OSHA/OR-OSHA – making a safety complaint
- Use of FMLA/OFLA leave
- USERRA leaves of absence
- Equal Pay Act – complaining about pay inequities
- Age Discrimination in Employment Act
- Workers' compensation
- Jury duty

...and many more!!



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ORS 659A.203 - Public Employers May Not:

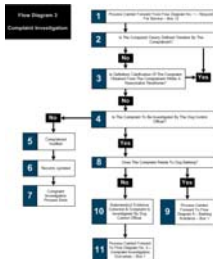
- Prohibit employees from talking to the government about their employer's "activities"
- Prohibit, discipline or threaten to discipline employees for disclosing information that the employee "reasonably believes" is evidence of:
 - A violation of any federal or state law, rule or regulation by the state, agency or political subdivision;
 - Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision.



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Tips for Avoiding Retaliation Claims

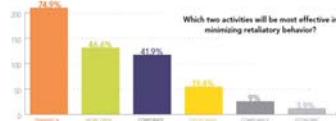
- Do you have a policy that explicitly prohibits retaliation?
 - Examples of prohibited adverse actions?
 - Complaint reporting procedure?
 - Complaint investigation procedure (with no guarantee of confidentiality)?



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Tips for Avoiding Retaliation Claims

- Have you conducted training for your managers/supervisors on how to prevent retaliation complaints? Subjects:
 - The organization's policy prohibiting retaliation
 - The difference between a gripe and a complaint
 - Examples of retaliatory acts
 - The consequences of retaliation (lawsuits, money damages, etc.)





The Great Mystery . . .

“DUE PROCESS” RIGHTS AT TERMINATION



Know the “Rules” Regarding Discipline: Due Process Issues

- Applies to public employers
 - Employees represented by a union
 - Even some employees who are not represented
 - Can also apply where your organization's policies provide for “just cause” termination or discipline



Know the “Rules” Regarding Discipline: Due Process Issues

- Key Rule: **Give the employee notice and an opportunity to be heard!**
 - After your review of the situation, but before you have reached a final decision about what discipline to impose (or whether to terminate)

*This applies to terminations **and** suspensions!*



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What Kind of Notice?

- Notice of **the action** contemplated
 - Nature of discipline must be specified
 - “Further disciplinary measures” is inadequate
- Notice of **the charges** with sufficient particularity to enable him or her to identify and respond
 - Dates
 - Acts
 - Persons involved



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What Kind Of Opportunity to Be Heard?

1. The employee must have a **reasonable amount of time** to respond
 - NOT the same day he or she receives the notice
 - Ideally, no less than two full business days; even more time is better.



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What Kind Of Opportunity to Be Heard?

2. The employee must have a **reasonable opportunity** to respond
- Formal hearing? No.
 - Decision-maker? Yes.
 - The "incriminating evidence"? Somewhat.
 - An opportunity for the employee to present his or her side of events? Yes, but with limits.



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What's the Difference?



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- Timing
- Things NOT to Say
- Layoffs
- Final Paychecks
- Severance Agreements

OTHER TERMINATION-RELATED ISSUES



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Termination Timing

- Avoid, at all costs, firing someone on a Friday
- Avoid, if possible, firing someone during the holidays



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Termination Tongue-Twisters

(Things NOT to say during the termination meeting)

- “I really hate to do this, but . . .” or “This is hard for me, too . . .”
- “This is a decision by the organization that I don’t necessarily agree with. . .”
- “I agree that this should probably have been pointed out to you sooner . . .”



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Termination Tongue-Twisters

(Things NOT to say during the termination meeting)

- “You really shouldn’t have filed that complaint with OR-OSHA. It raised questions about your loyalty.”
- “Management believes we need some ‘new blood’ around here (or people with ‘fresh perspectives’).”
- “I don’t have to give you a reason.”



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What are the “rules” re: layoffs?

- WARN Act – Private employers with 100 or more employees, including quasi-public entities organized separately from regular government.
- No “mini-WARN Act” in Oregon;
therefore . . .
 - *There are no hard and fast rules for most CIS members regarding notice or notification to government agencies when a layoff occurs.*



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What are the “rules” re: Final Paychecks?

- Must actually be delivered
 - Unless employee requests mailing
 - May be directly deposited provided the employee and employer have agreed to such deposit
- Must include all wages earned and unpaid at time of termination
 - Include earned vacation time and sick leave unless policy states otherwise
 - Remember to include accrued comp time!



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What are the rules re: Final Paychecks?

- If employer terminates, or if by mutual agreement, due and payable not later than end of 1st business day after termination
- If employee quits with 48 hours notice, due and payable on last working day
- If employee quits without 48 hours notice, due and payable within 5 days or first payroll, whichever is earlier
- These rules do not apply if a CBA provides otherwise



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When can I deduct money from my employee's final paycheck?

- Answer: Almost Never
- When deductions not otherwise required by law are allowed:
 - Employee authorizes in writing, deduction is for employee benefit, and is recorded in employer books
 - Employee voluntarily authorizes and employer is not recipient
 - Authorized by collective bargaining agreement



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When do I have to pay severance?

- When your policies state that severance will be paid
- When the contracts you enter into with employees identify the circumstances under which severance will be paid
- When the employee who is being terminated is a "red flag" employee (and because you don't want to be sued)



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What are *some* of the essential elements of a severance agreement?

- Reason employee is leaving and effective date
- No eligibility for future employment
- Confidentiality? Not likely.
- No disparagement? Great, but . . .
- "Older worker" rules (for those who are 40 years of age or older)



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Proceed with caution!


**WHAT IF SOMEONE WANTS TO
KNOW ABOUT MY FORMER
EMPLOYEE?**


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An Employer's Defense (ORS 30.178)


- Employers are immune from civil liability for giving "good faith" referrals
 - Can't be "knowingly false or deliberately misleading"
 - No "malicious purpose"
 - Can't violate any civil right of the employee found in ORS 659 or 659A





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Employer References and Defamation

- General Rule: A former employee can't sue a former employer for defamation due to reference if it is "based on a claim that in seeking subsequent employment the former employee will be forced to reveal the reasons given by the employer for the termination."
- Truth is a defense!




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Blacklisting Prohibited!

- Employers can't blacklist any terminated employee "with intent and for the purpose of preventing such employee . . . from engaging in or securing similar or other employment" (ORS 659.805)
- In sum: Don't prevent a discharged employee from securing employment!



Providing References

- Develop consistent response to all requests.
- Route all requests to one or two key individuals.
- Give only specific, documented facts, not subjective opinions.
- Provide only information that is job-related.
- Provide information only to those who have a business-related need to know.
- Obtain signed releases from your former employees before giving responses to requests.



Providing References, *cont'd*

But shouldn't I disclose to the next poor sap
that this dude/dudette
isn't a good employee?



What about the Department of Employment (Unemployment)?

- Make sure the reasons you provide are consistent with what you told the employee.
- Effective October 7, 2013, no more “responding via silence” maneuvers!
- Consider the value to NOT appealing a finding in favor of the employee.



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Questions?

“... you can either
ask the question
or
experience the answer ...”



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- Author unknown
(source: <http://www.gaia.com/quotes/topics/questions>)

THANK YOU!

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CIS UPCOMING EVENTS

CIS Webinars: 10:00-11:00 a.m. (4th Thursday)

- **January 23** – “New Year’s Employment Law Resolutions”
- **February** – **No Webinar**. Join us at the CIS Conference for “Performance Reviews” employment law training on February 28 at 10:30-11:30 a.m.



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CIS UPCOMING EVENTS



Harassment in the Government Workplace (regional training)

February 10 and 14 – City of Tillamook, 9:00-11:00 a.m. or 1:00-3:00 p.m.

CIS UPCOMING EVENTS

Agility Webinar (free): 11:00 a.m.-12:00 p.m.

January 14 – “Business Survival: Agility’s Disaster Recovery Solutions”
Bob Boyd, Agility’s president and CEO

January 23 – “2013 Year in Review: Valuable Lessons & Best Practices”
To register: <http://www2.agilityrecovery.com/about/events>



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CIS UPCOMING EVENTS

CIS Conference: February 26, 27, 28



Portland Marriott Downtown Waterfront
