



Don't Get Tricked! How To Avoid the Scariest Employment Claims: Retaliation and Whistleblowing

Tamara E. Jones & Katie Kammer  
CIS Pre-Loss Attorneys



CIS  
Chubb Insurance Services  
Group, Inc.

---

---

---

---

---


---

---

---

Retaliation Claims: Spooky Statistics

- Out of the roughly 89,000 charges processed by the EEOC in FY 2015, almost 40,000 involved retaliation claims (44.5%).
- More employees bring retaliation and whistleblower claims against their employers than any other type of claim.



CIS  
Chubb Insurance Services  
Group, Inc.

---

---

---

---

---

---


---

---

Agenda

1. Learn the basics of whistleblower/retaliation law so those claims don't come back to haunt you.
2. Hear developments in federal and Oregon law that will give you the heebie-jeebies.

**Available for downloading:** Tricks (not treats) for developing an effective whistleblower/no-retaliation program for your organization.



CIS  
Chubb Insurance Services  
Group, Inc.

---

---

---

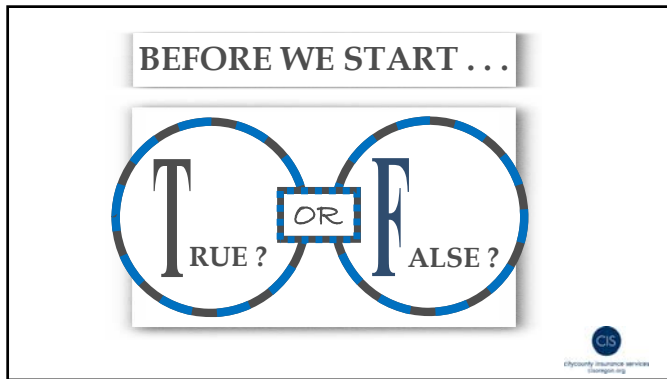
---

---

---

---

---




---

---

---

---

---

---

---

---

True or False?

➞ An employee who claims she was fired for reporting sexual harassment must prove that she was harassed.

CIS  
CityCounty Insurance Services  
Chattanooga.org

---

---

---

---

---

---

---

---

True or False?

➞ My employee complained about not getting paid rest breaks, but he's an exempt employee.

➞ An employee needs to know the law if he wants to sue his employer for retaliation.

CIS  
CityCounty Insurance Services  
Chattanooga.org

---

---

---

---

---

---

---

---

## True or False?

- ➡ The only employees who can bring retaliation claims are those employees who personally complain/engage in protected activity.




---

---

---

---

---

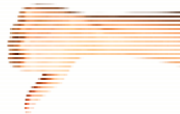
---

---

---

## True or False?

- ➡ Giving an employee a bad evaluation isn't a form of retaliation.




---

---

---

---

---

---

---

---

## True or False?

- ➡ Giving an employee a drug test isn't a form of retaliation.




---

---

---

---

---

---

---

---

### True or False?

➡ I can discipline my employee for choosing to go outside of my organization to report fraud, because she didn't use our thoughtful, detailed and *mandatory* internal "open door" policy.

She knew about our policy and violated it.




---

---

---

---

---

---

---

---

### The Origins of Whistleblower and Retaliation Claims

Learn the basics of the law so those claims won't come back to haunt you.

---

---

---

---

---

---

---

---

### Federal/Oregon Retaliation Laws

- Fair Labor Standards Act (federal) and Oregon wage and hour laws (especially new ORS 652.355)
- Title VII (federal) and ORS 659A.030 (discrimination and harassment)
- FMLA and OFLA (includes when an employee asks about leave options) and Oregon's new sick leave law
- Workers' compensation (Oregon)
- Making complaints about safety-related issues (OSHA and OR-OSHA)




---

---

---

---

---

---

---

---

## Whistleblowing Activities Lurking in the Shadows

- Bringing a civil proceeding *in good faith* against an employer
- Reporting criminal activity by another person, or cooperating with any law enforcement agency conducting a criminal investigation, or causing criminal charges to be brought against anyone
- Testifying *in good faith* at a civil proceeding or criminal trial
- Testifying *in good faith* at an unemployment compensation hearing
- But wait, there's more! For a helpful list:  
– [http://www.oregon.gov/boli/TA/docs/T\\_FAQ\\_Protected\\_Classes\\_2014.pdf](http://www.oregon.gov/boli/TA/docs/T_FAQ_Protected_Classes_2014.pdf)



citycountyinsuranceservices  
clatsop.org

---

---

---

---

---

---

---

---

**What Does  
“In Good Faith”  
Mean?**

**It's a Mystery!**



citycountyinsuranceservices  
clatsop.org

---

---

---

---

---

---

---

---

**ORS 659A.200 – 659A.224**

*Key Points for the  
Oregon Public  
Employer*



citycountyinsuranceservices  
clatsop.org

---

---

---

---

---

---

---

---

### ORS 659A.203: Beware, It's Forbidden To...

- 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, state or local law, rule or regulation by the public employer; or
  - Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the public employer.




---

---

---

---

---

---

---

---

### "Mismanagement" Defined

It must relate to serious misconduct that is of public concern and that does or could undermine the employer's ability to perform its mission.

- Routine complaints regarding a public employer's policies is not enough. *Hall v. Douglas County*, 226 Or. App. 276 (2009)




---

---

---

---

---

---

---

---

### "Gross Waste of Funds" Defined

An expenditure that is significantly out of proportion to the benefit expected to accrue to the agency and is more than a debatable expenditure.

–OAR 839-010-0010(6)




---

---

---

---

---

---

---

---

### "Abuse of Authority" Defined

To "deliberately exceed or make improper use of delegated or inherent authority or to employ it in an illegal manner."  
OAR 839-010-0010(1)

–Not included: An employee's complaint of "political favoritism."

• *Fox v. Josephine County*, 2010 BL 178545, 7 (D. Or. 2010)




---

---

---

---

---

---

---

---

### "Substantial & Specific Danger to Public Health & Safety" Defined

"A specified risk of serious injury, illness, peril or loss, to which the exposure of the public is a gross deviation from the standard of care or competence that a reasonable person would observe in the same situation." OAR 839-010-0010(10)

- The reported activity must rise in magnitude to a level of public concern in order for complaints about it to be protected. *Bjurstrom v. Oregon Lottery*, 202 Or. App. 162 (2005)




---

---

---

---

---

---

---

---

### ORS 659A.203: Employers Aren't Powerless

- You CAN instruct an employee to represent the employee's personal opinions as his or her own (unless you want them to represent the organization).
- You CAN keep information confidential (if it's confidential under state or federal law).




---

---

---

---

---

---

---

---

## ORS 659A.203: Employers Aren't Powerless

You CAN institute disciplinary action against an employee if:

- the information disclosed by the employee is known by the employee to be false;
- the employee discloses the information with reckless disregard for its truth or falsity; or
- the information disclosed relates to the employee's own misconduct.




---

---

---

---

---

---

---

---

## ORS 659A.203: Privacy

A public employer may not disclose the "identity" of an employee who complains about any of the things identified in ORS 659A.203 "without the written consent of the employee during any investigation of the information provided by the employee..." (ORS 659A.218)




---

---

---

---

---

---

---

---

## ORS 659A.199: Also Applicable

- It is an unlawful employment practice "for an employer" to discriminate or retaliate against an employee because "the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."




---

---

---

---

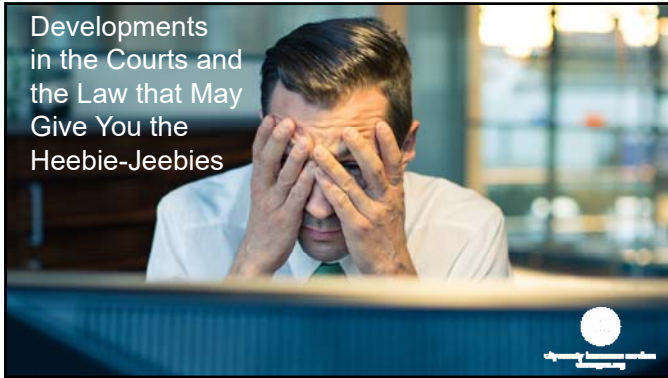
---

---

---

---






---

---

---

---

---

---

---

---

### ORS 659A.203: Employee Protection

Employees who have a “good faith and objectively reasonable belief” that their employer violated a law have an affirmative defense to any civil or criminal charges related to the disclosure of that belief.

- Information must have been “lawfully accessed” by the employee.
- Must be provided to specified agencies or a “manager” of the employer.




---

---

---

---

---

---

---

---

### ORS 659A.203: Employer Obligation

- Employers “shall establish and implement a policy regarding employees who invoke their rights” under the law. The policy “shall delineate all rights and remedies provided to employees” under the law.
- Employers must provide either a written or electronic copy “to each employee.”
- Deadline: Jan. 1, 2017.




---

---

---

---

---

---

---

---

## New OSHA Final Rules



- Effective Aug. 10, 2016
- New anti-discrimination and anti-retaliation rule applies to all employers
- New caution regarding post-accident drug testing




---

---

---

---

---

---

---

---

## New OSHA Rules regarding Retaliation

- Employers may not discharge or discriminate against an employee for reporting a work-related injury or illness.
- Employers may not take "any adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness."




---

---

---

---

---

---

---

---

## New OSHA Rules regarding Retaliation

- Employer policies that require an employee to immediately report an injury or be disciplined may be retaliatory.
- Example of a "reasonable" reporting policy: Must allow for reporting within a reasonable time after the employee realized that he/she suffered a work-related injury.




---

---

---

---

---

---

---

---

## New OSHA Rules regarding Drug Testing

OSHA:

- “Blanket post-injury drug testing policies deter proper reporting.”
- Drug testing alone constitutes an “adverse employment action.”




---

---

---

---

---

---

---

---

## New OSHA Rules regarding Drug Testing

- Therefore, per OSHA, employers must “limit post-incident testing to situations in which employee **drug use is likely to have contributed to the incident**, and for which the drug test can accurately identify impairment caused by drug use.”
- “[I]t would not likely be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction.”




---

---

---

---

---

---

---

---

## New OSHA Rules: Employer Responses

- What does your policy state about post-accident testing?
  - Is it mandatory in all cases?
  - Does it warn employees that testing will occur where there is a reasonable basis to believe alcohol/drug use contributed to the accident?
- What federal or Oregon laws provide for drug testing and do we follow those laws?

Policy




---

---

---

---

---

---

---

---

## New OSHA Rules: Employer Response

- The new rules require the employer to have a compliant anti-retaliation policy by Aug. 10, 2016.
  - Employers should also revise any drug-testing policies as soon as possible (remember to confer with the union).
- Employers are not prohibited from disciplining employees who violate workplace safety rules!




---

---

---

---

---

---

---

---

## “Adverse Employment Actions” – Really?

Examples of actions that could be “adverse employment actions,” according to the Ninth Circuit Court of Appeals:

- Removing an employee from a particular job assignment resulting in economic consequences (loss of extra pay);
- Prohibiting an employee from using break time to travel between work sites, requiring her to use unpaid time for work travel;
- Rescinding a previously approved vacation; and
- Putting an employee on paid administrative leave, when the leave has economic consequences.




---

---

---

---

---

---

---

---

## FMLA/OFLA Retaliation – Case Scenario

- Employee’s approved FMLA leave for a blood disorder was extended by the employer after she broke her wrist in a non-work setting.
- She wasn’t reinstated to her former position because employee’s doctor told the employer that employee couldn’t do the essential functions.




---

---

---

---

---

---

---

---

### FMLA/OFLA Retaliation – Case Scenario

- Before her return to work date, employee's supervisor announced that a part-time nurse had been hired to handle the employee's duties.
- Employee sued. Jury awarded \$567,500 in back pay, but judge reversed this verdict. Employer appealed. Employee appealed. Court: Reinstate verdict.  
– *Esler v. Sylvia Reardon* (Mass. 2016)




---

---

---

---

---

---

---

---

### FMLA/OFLA Retaliation

#### Lessons Learned:

- Don't announce, before a return to work date has come and gone, that a replacement worker has been hired.
- An employee's inability to return to work at the conclusion of a FMLA/OFLA leave does not mean that the employer can avoid liability by firing the employee.  
– If nothing else, think of ADA obligations.




---

---

---

---

---

---

---

---

### Oregon Sick Leave Law Retaliation

- Under Oregon's new Sick Leave Law, "it is an unlawful employment practice for an employer...to retaliate or in any way discriminate against an employee...because the employee has:
  - Inquired about sick time;
  - Submitted a request for sick time;
  - Taken sick time;
  - Participated in any manner in an investigation related to sick time;
  - Or invoked any provision of the Sick Leave Law.




---

---

---

---

---

---

---

---

### Huh? What Does That Mean?



- Can we discipline an employee who uses more than 40 hours of sick leave in a year?
- Can we discipline an employee who is gaming the system?
- Can we discipline an employee who goes into unpaid status?




---

---

---

---

---

---

---

---

### ADA and Retaliation – Case Scenario

- Employee bookkeeper for a small Catholic parish church took sick leave for 10 months.
- During her absence, the parish figured out that the position didn't need to be full time. When she returned from sick leave, she was offered a part-time bookkeeping position.
- Employee sued for disability discrimination.

– *Mendoza v. The Roman Catholic Archbishop of Los Angeles* (9th Circuit Court of Appeals, June 7, 2016)




---

---

---

---

---

---

---

---

### ADA and Retaliation – Case Scenario

- The parish eliminated the FT position for legitimate reasons; no proof of retaliation of discrimination.
- Ninth Circuit: In an ADA case, the employee must prove his/her case by showing either that the employer's actions were directly related to the disability or that the employer had a discriminatory motive (if the employer asserts a legitimate, non-discriminatory reason).

– *Mendoza v. The Roman Catholic Archbishop of Los Angeles* (9th Circuit Court of Appeals, June 7, 2016)




---

---

---

---

---

---

---

---

## ADA and Retaliation

### Key Takeaways for Employers:

- Any changes to a disabled worker's position during a leave of absence must be for legitimate, non-discriminatory reasons: *How will YOU prove this?*
- ADA requires employers to seek alternative positions if the disabled worker's initial position is no longer available or was eliminated.




---

---

---

---

---

---

---

---

## Oregon Wage and Hour Retaliation

An employer may not discharge or in any other manner discriminate against an employee because the employee:

- made a wage claim;
- discussed, inquired about or consulted an attorney or agency about a wage claim; or
- has testified or is about to testify in any formal wage proceedings.




---

---

---

---

---

---

---

---

## Oregon Wage Transparency Retaliation

As of 2015, employers cannot discharge, demote or suspend, discriminate or retaliate against an employee because the employee has:

- Inquired about, discussed or disclosed in any manner the wages of the employee or of another employee.




---

---

---

---

---

---

---

---

## Wage and Hour Retaliation

### Lessons Learned

- Proceed with caution when an employee – particularly a managerial employee – “reports” your organization’s non-compliance with labor and employment laws.
- Take all such “reports” seriously, even when an employee is doing something you think isn’t part of his or her job duties.
- Do not discipline employees who are discussing their wages with each other.




---

---

---

---

---

---

---

---

### Other Key Points from Cases

- Oral complaints of a protected activity will provide protection to employees.
- The employee who brings a claim doesn't have to be the employee who actually did something protected under a law.
- An employee who can show that the decision-maker was influenced by the employee's supervisor will be protected if the supervisor was motivated by discriminatory animus and intended for his or her conduct to result in an adverse employment action.




---

---

---

---

---

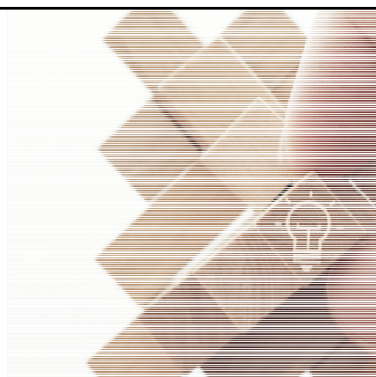
---

---

---

### Questions?

*Don't be afraid to ask!*




---

---

---

---

---

---

---

---



**Thank you!**  
*Happy Halloween!*

**Contact Info**

**Tamara E. Jones**  
Senior Pre-Loss Attorney  
503-763-3845  
[tjones@cisoregon.org](mailto:tjones@cisoregon.org)

**Katie Kammer**  
Pre-Loss Attorney  
503-763-3860  
[kkammer@cisoregon.org](mailto:kkammer@cisoregon.org)



---

---

---

---

---

---

---