

Retaliation Claims and Potential Claimants May Increase Litigation in the Medical Field

By **Darren A. Feider**
Member
Williams Kastner



Introduction

Medical professionals are sensitive to potential claims from employees for age, gender, race, national origin, citizenship, religious, sexual orientation, and disability discrimination or workplace harassment claims. Most organizations have developed and published non-discrimination and anti-harassment policies and complaint mechanisms in their handbooks or manuals, train their staff

on these policies, and, when faced with a claim, investigate and take prompt and effective remedial action to address the situation and eliminate any discrimination and harassment in the workplace. This increased employer sophistication has resulted in fewer claims, happier workplaces, and concurrently lower liability exposure. Even where no unlawful discrimination or harassment occurred, an employee may still assert unlawful retaliation or “whistleblower” status for having complained about another’s allegedly unlawful conduct or having participated in an investigation into the complaint. The Equal Employment Opportunity Commission (EEOC) which investigates and prosecutes claimed violations of federal employment laws reports that retaliation claims are on the rise and exceed those alleging any other type of claim at this point in its history. Retaliation is perceived as a “growth industry” for lawsuits.

Retaliation, by itself, is not a new phenomena in employment law. The Civil Rights Act of 1964 (Title VII) has long proscribed unlawful retaliation for employee

complaints concerning unlawful harassment or discrimination. Employers generally understand not to take any adverse action in response to an employee complaint of discrimination or harassment. However, in the medical field and others, there has been a significant increase in protections for those who claim retaliation or are whistleblowers. Nearly all recent laws include retaliation protection, thereby greatly expanding potential employer liability. To add to the increased exposure, the U.S. Supreme Court has recently expanded, or at least clarified the definition of protected individuals who may bring retaliation claims. As a medical health professional, you may be exposed to retaliation claims if you discipline an employee who, for instance, objects to patient care or to certain billing or other business practices.

Claim Expansion

Arguably, the most contentious legislation for decades is the recent health care reform bill – “The Patient Protection and Affordable Care Act of 2009,” which provides healthcare workers with protection

from retaliation by and for using whistleblower claims against their employers. The law provides that, if an employee reports any conduct that he or she reasonably believes violates the Act, the employee is protected from any adverse employment action. This “report” does not require formal action. He or she does not need to “whistle-blow” and somehow report the employer to an agency. The complaint can be made to administrators or other supervisors or to the federal government and/or a state attorney general. This protection extends to individuals who participate in an investigation or simply object and refuse to join activity they reasonably believe to violate the Act. Protected complaints can concern health insurance, the denial of coverage for pre-existing conditions, policy or financial reporting, and the receipt of health insurance subsidies. Most importantly and often misunderstood by employers, the complaint does not need to be valid. If the complaint somehow relates to the Act, the employee is protected even if it is wrong as long as the employee reasonably believes the Act is being violated. In a practical sense, if the employer seeks to discipline, demote, transfer or terminate, after an employee complains it has violated the Act, the employer may face a retaliation claim.

As with employment discrimination claims brought under Title VII, an employee must file a charge of discrimination within 180 days, and the appropriate agency will investigate: interviewing the employer, supervisors, co-workers and others and demanding the production of documents. At the end of the investigation, the employee

can either rely on the agency action or file a lawsuit in federal court. If there is a finding that the protected complaint was a “contributing factor” in the adverse employment – *i.e.*, not necessarily the sole, main or substantial reason but merely a contributing factor, the burden of proof shifts to the employer to show by clear and convincing evidence that it would have taken the same action even if the employee had not engaged in the protected conduct. That is a high standard which is hard to meet. Often, the burden of proof shifts merely because there is temporal proximity between the complaint and the adverse employment action. In other words, employees who are aware that they may face a demotion or firing may attempt to preempt the action by complaining of a violation of the Act. If successful, the employee can recover back wages, emotional distress damages and attorney fees and be reinstated to the prior position.

There are other laws providing retaliation claims of which medical professionals should be aware. For example, if an employer receives funds from the federal government either in the form of recovery funds or as a federal contractor, the American Recovery and Reinvestment Act (ARRA) has retaliation provisions similar to those found in the recent health care reform law. The Health Insurance Portability and Accountability Act (HIPAA) also has retaliation and whistleblower provision related to the use and disclosure of patient data. Thus, there are many retaliation claims that an employee may assert against medical professionals.

Claimant Expansion

Recent amendments and U.S. Supreme Court decisions have greatly expanded who may bring retaliation claims. The previously mentioned health care reform act strengthened the False Claims Act, which encourages and may financially reward those who report employer fraud or other bad conduct to the federal government. In the medical field, those who receive government funds or reimbursements such as Medicare can be exposed to a False Claim lawsuit initiated by employees who report alleged bad conduct or perceived healthcare fraud. These individuals can receive a percentage of the government’s recovery if he or she was the “original source” of the information. That is, information which did not come from a publicly disclosed source. Now, under the new amendment, an employee can still recover even if he or she was not the “original source” if the reported information is independent of, and materially adds to, the publicly available information. The False Claims Act applies not only to employees but also to independent contractors and agents. Finally, the Act protects an employee from discharge, demotion, suspension or other harassment in retaliation for reporting the alleged conduct – even if the conduct was not fraudulent or unlawful under the False Claims Act.

In 2011, the U.S. Supreme Court in *Thompson v. North American Stainless LP* (January 24, 2011) expanded who may sue for retaliation holding that an employer may not retaliate against certain third-parties for the protested actions of another. In *Thompson*, the plaintiff sued his employer claiming that he was fired because his fiancé

had filed gender and harassment claims with the EEOC against the employer. In other words, he alleged, the employer had retaliated against him for her actions, arguably to place indirect pressure on her to drop her claims. The employer moved to dismiss because the plaintiff had himself not complained, of sex discrimination nor had he engaged in any conduct that would protect him from retaliation. He had not participated in an investigation or complained on behalf of his fiancé (which would have been protected under existing law). The Supreme Court rejected its argument and held “[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.” Thus, even if an employee has not engaged in any protective conduct but has a fiancé, spouse or close family member who has engaged in such conduct, he or she may now be able to assert a retaliation claim in response to an adverse employment action. This holding greatly expands who may assert retaliation claims.

A few months later, the U.S. Supreme Court further expanded retaliation exposure by holding that a complaint need not be in writing in order to be protected. In *Kas-*

ten v. Saint-Gobain Performance Plastics Corp. (March 22, 2011), the Supreme Court held that oral complaints could protect from retaliation. In *Kasten*, the employee routinely complained to his supervisor, HR and anyone who would listen about the location of the time clocks. He claimed the clocks were situated far away from where the employees put on their protective gear in order to avoid paying for the time of putting on their gear at the start of their shift and taking it off at the end. He told several supervisors that he was “thinking about starting a lawsuit about the placement of the time clocks.” After being disciplined and fired, he claimed the employer had retaliated because of his oral complaints. The employer disagreed and explained that he was fired because he refused to use the time clocks (which was true). More importantly, the employer argued that he could not claim retaliation because he did not file a written complaint. The Supreme Court disagreed and found a complaint can be oral and must only 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.” It did not need to be in writing. Thus,

under recent Supreme Court authority, employers must be aware that oral complaints can support a retaliation claim.

The take-away from all of this is that when contemplating taking adverse action against an employee, employers must consider whether the employee is in a class protected from retaliation or closely related to someone who is and if so, make sure that it can show that the allegedly protected activity is not a factor in the decision.

Darren A. Feider is a Member in the Seattle office. His practice involves general employment litigation of wrongful discharge and discrimination claims, the drafting of employment and consulting contracts, non-compete agreements and severance packages for both employees and employers, and conducting investigations for private and public employers in response to EEOC and Washington State Human Rights Commission complaints. He can be reached at dfeider@williamskastner.com.

Williams Kastner has been providing legal service to health care providers and other clients since 1929. It has offices in Seattle and Tacoma, Washington and Portland, Oregon.

Reprinted with permission from the Oregon Healthcare News. To learn more about the Oregon Healthcare News visit orhcnews.com.