

Workplace Retaliation



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AGENDA

- Defining and Understanding Workplace Retaliation Claims
- Cautionary Cases
- Ten Tips to Avoid Workplace Retaliation Claims

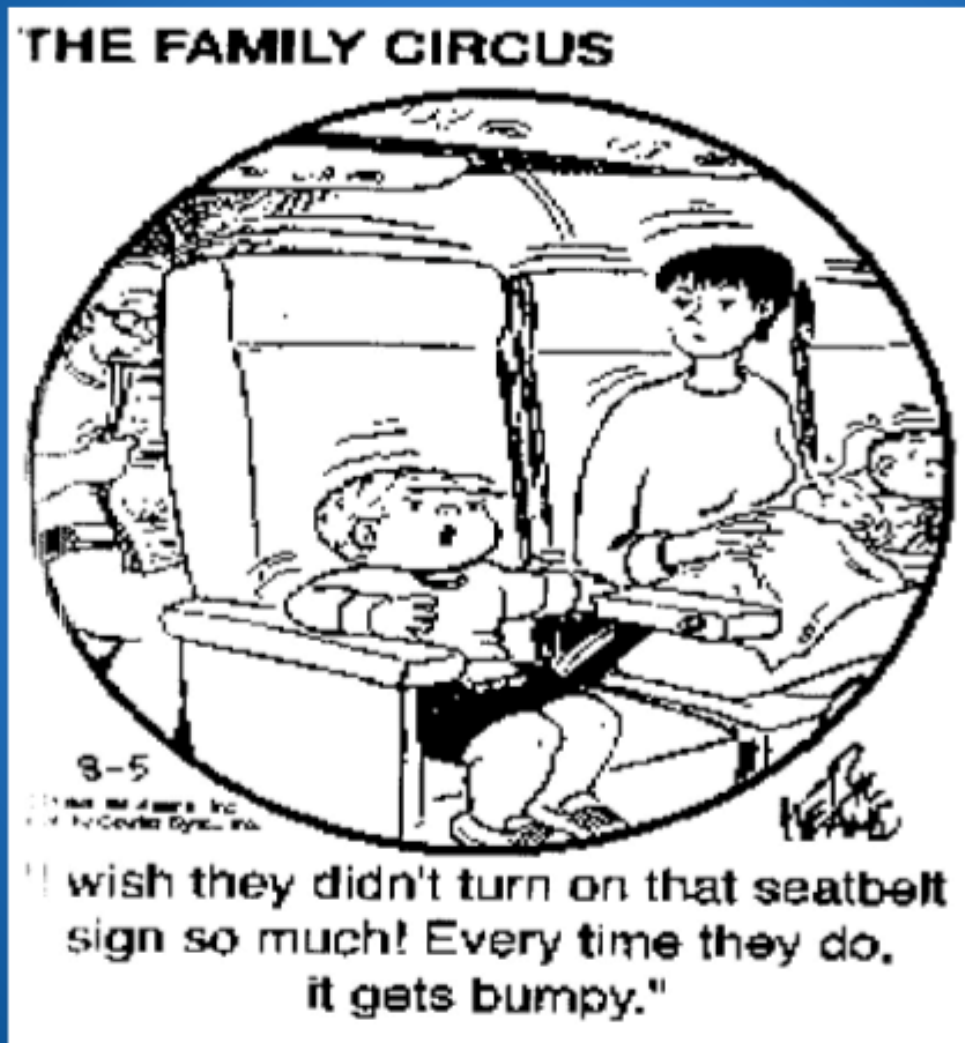
WHAT IS WORKPLACE RETALIATION?



What are Elements of a Retaliation Claim?

- Protected activity;
- Adverse employment action;
- Causal connection between the protected activity and the adverse employment action.

Causal Connection?



Who can sue for Retaliation?



COMMON EXAMPLES OF PROTECTED ACTIVITY

- **Federal Statutes, State Statutes,
and Constitutional Protections**



Federal Statutes

- *Title VII of the Civil Rights Act of 1964*
- *The Americans with Disabilities Act (ADA)*
- *The Family Medical Leave Act (FMLA)*



State Statutes



OREGON
SCHOOL
BOARDS
ASSOCIATION

Constitutional Protections

Bill of Rights

Congress OF THE United States,

*begun and held at the City of New York, on
Wednesday, the fourth of March, one thousand seven hundred and eighty nine.*

The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution:

Resolved, by the SENATE and HOUSE of REPRESENTATIVES of the UNITED STATES of AMERICA in Congress assembled, two thirds of both Houses concurring. That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

Article the first After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons. [Not Ratified]

Article the second No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. [Not Ratified]

Article the third Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

In order to be protected by the First Amendment:

- (1) an employee's speech must be made "as a citizen on a matter of public concern," and
- (2) the agency's interest in nondisclosure must not outweigh the employee's interest in freedom of expression.

WORKPLACE RETALIATION CASES



(Subtitle: Cautionary Tales)

Dew v. City of Scappoose, 208 Or.App. 121 (2006)

**“ I do not agree with what you have to say
but I'll defend to the death
your right to say it. ”**

~Voltaire

#freedom_of_speech

Davis v. Tri-County
Metropolitan Transportation
District of Oregon, 45
F.Supp.3d 1222 (D.Or.
September 8, 2014)



Harper v. Mt. Hood Community College, 283 Or.App.207 (2016)



Huffman v. Scappoose Sch.
Dist. No. 1 J, 3:14-CV-00941-
MO, 2015 U.S. Dist. LEXIS
97971 (D. Or. July 28, 2015)





TOP TEN TIPS FOR PREVENTING RETALIATION CLAIMS

Tip #1: STRONG POLICIES

The initiation of a complaint in good faith about behavior that may violate this policy shall not adversely affect the educational assignments or study environment of a student complainant or any terms or conditions of employment or work environment of the staff complainant. There shall be no retaliation by the district against any person who, in good faith, reports, files a complaint or otherwise participates in an investigation or inquiry of sexual harassment.

Tip #2: Recognize and properly direct protected activity



Tip #3: Limit knowledge and discussion of protected activity



Tip #4: Engage prompt and neutral investigation of acts of retaliation



Tip #5: Don't overreact or make it personal



**KEEP
CALM
AND
DON'T
OVERREACT**

Tip #6: Beware of well-intentioned retaliation



Tip #7: Be careful not to isolate a complaining employee



Tip #8: Thoroughly document
continuing
underperformance or
disciplinary matters

Performance Rating

High
Above Average
Average
Below Average
Low

org/division/dept: position: time in present position: ref: length: apprai:

Performance ID: time: Title: Employee Servi nd From:

Tip #9: Follow up



Tip #10: Identify “high risk” employment actions, review with an attorney and carefully consider severance/resignation agreements





Questions

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