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## The GSH 60-Second Memo

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### A Refresher on Retaliation

By Ronald S. Stadler, Esq.

Perhaps in recognition of the increased diligence by employers and employment attorneys in preventing and defending against discrimination and harassment claims, a different (but hardly new) claim has begun appearing in an increasing number of employee complaints: retaliation for having opposed discrimination in the workplace.

Claims for retaliation in the workplace have expanded dramatically during the last few years. A record number of retaliation claims were filed with the Equal Employment Opportunity Commission (EEOC) in 2011, roughly 50% more than in 2006. Since 1997, the number of retaliation claims filed with the EEOC has more than doubled.

The popularity of retaliation claims is likely due to a host of factors. Such claims present particular challenges because once an employee complains of discrimination every subsequent employment action is given particular scrutiny. In addition, retaliation claims are broad, allowing employees who are otherwise outside of a protected category to find protection under discrimination laws. For example, a male employee under the age of 40 could claim that he was retaliated against for having opposed gender and age discrimination against a female coworker who is over the age of 40. Finally, such claims often present a fallback argument for employees when their other discrimination claims fail. An employee claiming illegal discrimination can also claim retaliation for having opposed this discriminatory treatment in the first place. The employer could prove that there was no discrimination but could still lose on the retaliation grounds.

In light of the increasing number of retaliation claims, it is helpful to review the nature of retaliation claims and how employers can help avert legal liability, for retaliation differs from discrimination or harassment claims in many key respects.

### What is Unlawful "Retaliation"?

Most state and federal laws, and the courts interpreting those laws, define retaliation as an "adverse action" taken against an employee because he or she engaged in a "protected activity." An adverse action could be anything from a reduction in pay or reassignment of job duties to termination of employment. "Protected activity" can include complaining that an employer has violated the law, participating in an investigation, filing a complaint with a government agency, or even requesting a protected leave of absence or reasonable accommodation. Of particular concern is the protection for simply complaining about alleged violations, because most courts have held that there are no "magic words" that must be uttered, so long as the employee can show that the words used would have alerted the employer to the fact that he or she was opposing illegal conduct.

### The Danger

Retaliation claims are dangerous for several reasons. The claims can be viable even when the alleged discriminatory conduct in question does not constitute unlawful harassment or discrimination. As long as the employee has a reasonable and good faith belief that he is complaining of illegal conduct, he is engaging in protected activity.

Additionally, the burden of proof may make it difficult to defeat a retaliation claim without a trial. The employer's burden is especially difficult when the adverse employment action follows alleged protected conduct and there is insufficient documentation to support an argument that the adverse action was justified and non-retaliatory. Without such documentation, it becomes a case of "he said, she said," which will often find its way to trial to resolve the credibility dispute. Of course, jury trials are extremely expensive, resulting in tens of thousands of dollars in legal fees and risking a loss that can easily reach six figures.

### Minimizing Risk

The good news is that employers can minimize risk of retaliation claims by being proactive. To begin, employers should institute formal anti-retaliation policies and procedures to address complaints, and employees should be aware that complaints will be addressed and that there will be no retaliation for filing complaints. Consider having the policies specifically address the steps the employer will take to investigate the complaint, how long the investigation should take, the method of response to the employee concerning their complaint, and a procedure to monitor any possible adverse employment actions following the initial complaint. Often times, complaints are alleged to have been verbal or even a fairly innocuous comment in an e-mail made to a supervisor or manager. Supervisors and managers, who are the front-line defenders against

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retaliation claims, should be trained to respond to complaints so that the employer can in turn respond appropriately. Managers and supervisors must also be aware that retaliatory conduct is prohibited and that they can face consequences for violating the anti-retaliation policy.

Policies that provide clear channels for reporting suspected discrimination or alleged harassment, such as contact information for human resources, is another best practice that can help avoid future liability. An employee's failure to report a complaint as directed under such a policy may help the employer to defend against future claims of retaliation.

If there has been opposition to alleged discrimination, employers must be vigilant to ensure that any subsequent adverse actions are unrelated to the employee's complaints. The best way to demonstrate that an adverse action was legitimate is to document poor performance and enforce policies consistently and contemporaneously to the employee's performance, not merely after an employee makes a complaint. No matter how legitimate and real performance issues are, post-complaint documentation can look a lot like retaliation to a judge or jury.

Of course, those employees who oppose alleged discrimination are not immunized from discipline or termination decisions by their employers. However, the scrutiny placed on the employer's actions is significantly greater than with other employment discrimination claims. Be certain the evidence justifying termination is well-documented and verifiable before taking adverse action against employees who complain, participate in, or are closely associated with employees who raise legal complaints in the workplace (such as by a family member or spouse). Defensible disciplinary actions are supported by well-developed documentation that follows the employer's procedures, precedents, and practices, leaving no question about the employer's legitimate business-related motivation in taking the action.

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