

No. 94209-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Certified Question
Propounded by The Hon. Justin L. Quackenbush
United States District Judge
United States District Court (E.D. Wash.)

Jin Zhu,

Plaintiff,

v.

North Central Educational Service District No. 171,

Defendant.

**STATEMENT OF ADDITIONAL AUTHORITIES
AMICUS
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION**

MACDONALD HOAGUE & BAYLESS
Jesse Wing, WSBA #27751
Sam Kramer, WSBA #50132
Hoge Building, Suite 1500
705 Second Avenue
Seattle, WA 98104
(206) 622-1604

BRESKIN JOHNSON TOWNSEND
Daniel Johnson, WSBA #27848
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652-8660

Attorneys for Amicus WELA

Under RAP 10.8, Amicus WELA submits this Statement of Additional Authority (cited in its Brief at page 8, which Defendant North Central Educational Service District No. 171 stated in its responsive brief, at pages 5 and 6, that it could not locate): Patricia A. Wise, *Understanding and Preventing Workplace Retaliation*, Chapter 4: “Preventing Retaliation,” at 5 (2015). See copy attached hereto.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By s/ Jesse Wing
Jesse Wing, WSBA #27751
Sam Kramer, WSBA #50132
Daniel Johnson, WSBA #27848
Attorneys for WELA

CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **Statement of Additional Authorities Amicus Washington Employment Lawyers Association** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

Attorneys for Jin Zhu, Plaintiff

Matthew Crotty (matt@crottyandson.com)
Andrew Biviano (abiviano@pt-law.com)
Michael Bradley Love (mike@michaellovelaw.com)

Attorneys for North Central Educational Service District No. 171, Defendant

Jerry Moberg (Jmoberg@jmlawps.com)
James Baker (jbaker@jmlawps.com)

Attorneys for Amicus Curiae WELA

Jeffrey Needle (jneedle@wolfenet.com)
Jesse Wing (jessew@mhb.com)
Sam Kramer (samk@mhb.com)
Dan Johnson (djohnson@bjtlegal.com)

Attorneys for Amicus Curiae WSAJ

Valerie D. McOmie (valeriemcomie@gmail.com)
Daniel E. Huntington (danhuntington@richter-wimberley.com)

Attorneys for Amicus Curiae ACLU

Rabi Lahiri (rabi.lahiri@gmail.com)
Nancy L. Talner (talner@aclu-wa.org)

Attorneys for Amicus Curiae Washington State School Directors' Association

Jean M. Wilkinson (jeanw@atg.wa.gov)

DATED this 22nd day of August, 2017, at Seattle, Washington.

/s/ Esmeralda Valenzuela
Esmeralda Valenzuela, Legal Assistant

Understanding and Preventing Workplace Retaliation Chapter 4

Understanding and Preventing Workplace Retaliation

Copyright © 2015 Thompson Information Services

By Patricia A. Wise^a
Chapter 4: Preventing Retaliation

PREVENTING RETALIATION

Retaliation may be more difficult for employers to guard against than discrimination or harassment. Retaliation can take so many forms that it is difficult to train employees and supervisors to recognize it and prevent it from occurring. It is a highly fact-specific matter. Employers should attempt to train employees and supervisors, however, so that they are aware of this potential claim.

The best defense against retaliation claims is the proverbial “good offense.” A variety of preventive measures can help to protect employers from liability for retaliation before claims occur. Although nothing can prevent employers from being sued, many advance precautions can ensure that employers are ultimately successful in most litigation for retaliation.

Designing an Effective Retaliation Policy

Employers should of course have effective discrimination and harassment policies in place. These policies and related training should include express prohibitions against retaliation. As with harassment and discrimination, employers should establish a complaint procedure for retaliation claims. Internal complaint resolution is far preferable to litigation.

The retaliation policy can be a separate policy, but is probably most effective as part of a broader policy prohibiting discrimination and harassment. In either case, employers should make it clear that retaliation is prohibited and that offenders will be disciplined and possibly discharged. An employer with a strong retaliation policy will be in a better position to defend a claim of retaliation, and show that it took all possible preventive measures. (Sample policy language is included in Appendix D.)

An effective retaliation policy should contain:

- A statement that retaliation will not be tolerated in the workplace.
- A procedure telling employees how and to whom to make a complaint. Retaliation complaints can be brought to the attention of supervisors, human resources professionals or other managers. Experts advise against designating just one person to handle complaints to ensure that workers have a place to turn if the designated person is the offender.
- A statement that complaints will be investigated promptly and that appropriate actions will be taken against individuals found to have engaged in retaliation.
- A statement indicating that the employer will maintain information in as confidential a manner as possible. (*Note:* This does not mean employers can guarantee confidentiality -- they cannot. Employers need to investigate complaints, and this usually necessitates telling those accused of retaliation the names of their accusers so they can properly defend themselves. For this reason, avoid promising *absolute* confidentiality.)
- A statement promising that the employer will not retaliate against an individual for lodging a complaint of discrimination or harassment nor allow any other employee of the company to engage in retaliatory behavior toward a complainant.

Effective communication of the policy statement to employees is essential. Employers should make sure all new and existing

employees receive a copy of their organization's retaliation policy. To further ensure broad dissemination of its policy, an employer should:

- Post the policy on bulletin boards within each company facility;
- Include the policy in personnel manuals or employee handbooks;
- Discuss the policy at employee orientation meetings; and
- Discuss the policy during training programs.

Establishing a Complaint Procedure

An effective complaint procedure helps employers minimize or avoid liability. Employees who are aware of their organization's procedures usually are more inclined to file complaints or raise concerns within the organization than to turn to outside agencies or the courts. Further, employers may reduce their liability even when employees directly pursue external legal remedies if effective complaint procedures are in place and the employer has a track record of dealing effectively and fairly with employees.

Tips for establishing a complaint procedure

In establishing a complaint procedure, it is helpful to keep these points in mind:

- ✓ The complaint procedure should permit employees to circumvent the normal chain of command when reporting retaliation.
- ✓ An employee's refusal to commit a complaint to writing does not excuse an employer from its responsibility to investigate the allegations. When complaints are made orally, the employer's representative should write down the complaint and, if possible, obtain the employee's verification that the prepared statement is accurate.
- ✓ The complaint procedure should be accessible and easy to use. If it is viewed as being too cumbersome, employees won't use it.

Employers should make it easy for workers to bring forward complaints of retaliation. Employees should be assured that their complaints will be handled promptly and discreetly. They also should be reassured that managers will not permit retaliation to be taken against workers who file complaints.

These elements should be a part of any employer complaint procedure:

- Identification of supervisors, human resource officers or managers to whom complaint may be reported;
- Training for supervisors and managers on how to spot and report potential problems;
- Procedures for ensuring prompt investigations;
- Procedures for documenting complaints;
- Instructions for communicating with complainants;
- Instructions for maintaining confidentiality as much as possible; and
- Procedures for documenting the investigator's conclusions and recommended corrective action.

And finally, an employer must act immediately to stop retaliation. Failure to take prompt remedial action to address these problems may result in employer liability, so a prudent employer will implement a remedy reasonably likely to end the retaliation even before the investigation is concluded. Examples of swift remedial action include: offering the complainant or alleged offender a paid leave of absence for the duration of the investigation; or offering a temporary transfer to either of the parties, removing any offensive graffiti or materials from the workplace. (*Note:* Any leave of absence or job transfer offered during the investigation must not disadvantage either party or it may open the way to a suit against the employer.)

Investigating Complaints of Retaliation

The investigation of complaints of retaliation (or claims of harassment or discrimination) is extremely important. An objective and thorough investigation can greatly assist the employer in addressing workplace problems and may even provide a way to avoid liability.

In investigating any claims of retaliation (or of discrimination or harassment), employers must take care never to admit blame or liability. The actual terms “retaliation,” “discrimination” and “harassment” should never be used by employers. These are legal terms with specific legal meanings. The employer’s use of such terms could bolster a plaintiff’s claim. If the employer itself documents “retaliation,” it will be hard to argue before a jury at a later date that no retaliation occurred. The complained-of behavior should instead be referred to as “unacceptable,” “offensive,” or “inappropriate” behavior.

If an employer determines that it is likely that retaliation (or discrimination or harassment) occurred, this too must be carefully documented. Again, employers should not discipline an individual for “retaliation,” “discrimination” or “harassment.” The terms above, or similar terms, should instead be used. The employer should never create any documentation referring in any way to investigations or conclusions of workplace “retaliation,” “discrimination” or “harassment.”

Once an employee complains of retaliation, or any other allegedly unlawful act or practice, that employee must be protected from further retaliation. Whenever an employee engages in protected activity, employers must closely monitor the parties involved to ensure that no retaliation occurs. It is helpful to periodically confirm with the person who has engaged in the protected activity that retaliation has not occurred. If he or she reports that it has, this will enable an employer to act quickly to resolve the situation and end the retaliation.

It is understandable that supervisors and co-workers (especially those accused of improper behavior) would have difficulty continuing to work with the complaining employee. In many cases, supervisors and co-workers may even be fearful of the complaining employee. They may be reluctant to work together, fearing that they too may become the subject of a complaint.

However, care must be taken to ensure that the complaining employee can continue in his or her employment, without fear of retaliation. In cases where a complaining employee or disciplined employee will still be supervised or evaluated by an accused employee, employers should take care to review all employment decisions involving the complainant and monitor the supervisor’s behavior toward the complainant. This will demonstrate the employer’s commitment to avoiding retaliation and should reduce the likelihood of its occurrence. All involved supervisors and employees must be fully informed about their responsibility to guard against retaliation as well as the potential penalties if they engage in retaliatory behavior.

Unfortunately, in trying to respond appropriately to employee complaints, employers sometimes unintentionally retaliate. For example, if an employee complains of consistently offensive or discriminatory remarks by a customer, the employer may think the customer should be assigned to another employee. This would arguably resolve the issue for the employee (although depending on the nature of the remarks, the employer may also need to speak directly to the customer). However, if the customer’s account generated large commissions for the employee, this may constitute an adverse or negative effect on the employee’s compensation. This could form the basis for a claim of retaliation.

Steps for Handling Complaints

The following steps for handling complaints can be used to address claims of retaliation or discrimination in the workplace.

1. Immediately investigate all complaints, i.e., take all complaints seriously. Even if you feel sure a complaint has no merit, or if you believe that there has simply been a miscommunication, your duty as an employer is to investigate. You cannot simply ignore complaints. Further, an investigation shows that you take these matters seriously and it can help prevent liability. Employers may be liable whether or not they know about unlawful activity, so it is best to be fully informed.
2. Where possible, take complainant to a place where you can speak privately, free from interruptions.
3. Elicit as many facts as possible by asking the right questions, in a manner that does not place the victim on the defensive:
 - Name of person making complaint? Name of alleged perpetrator?
 - What happened? (Get specifics.)
 - When? (Date? Time?)
 - Where?
 - Name of persons involved?
 - Names of witnesses?
 - Has this happened before? (If so, ask pertinent questions.)
 - Have you made any notes about these incidents? (If so, ask for a copy.)

- What does the complainant want you to do about it? Please note that even if the complainant asks that you keep the complaint confidential or do nothing, a manager or supervisor has a responsibility to inform appropriate officers. Explain that the employer has an obligation to respond to all complaints and stop all retaliation, and that it wants to protect other workers from becoming victims of misconduct. Assure the complainant that the investigator and managers will only discuss the complaint with those who have a reasonable need to know about it.
- Is there anything else at all, or any other incident to report?

4. Have the victim submit a signed, written statement, preferably notarized. Confirm, in writing, that the statement is complete. Make sure the victim has included all incidents. This provides you with all relevant information and enables you to begin a thorough investigation. Also, if the victim leaves your employment and cannot be located, the statement is still available. Most importantly, once the victim has completed a notarized, written statement, which specifies that it evidences the *complete* complaint, it will be very difficult for the victim to embellish or change the story at a later date. Details of complainants' stories frequently change over the course of a lawsuit. A written statement made at the time of the complaint, which the complainant certifies as complete, can reduce the likelihood of this happening. (A sample complaint form appears in Appendix D.)

5. Take detailed notes of facts elicited during your meeting. Review your notes immediately after the meeting to clarify or correct them. Never use labels that refer to unlawful conduct, such as "retaliation" or "harassment." (See discussion earlier in this chapter, on investigating claims of retaliation.) One of the best defenses for an employer is to have the victim submit a written statement, signed and notarized. The victim should confirm in writing that the statement is complete.

6. Report the complaint to a human resources officer or other high-level member of management designated to handle these types of complaints.

7. Once a complaint has been made, it should be investigated by speaking with the alleged perpetrator and any witnesses, maintaining confidentiality to the extent possible. Employees who work directly with the involved parties should be questioned, as well as any likely witnesses. Even if a witness states that he or she has observed nothing, or has no knowledge of the allegations, this too can be extremely useful information and should be documented.

8. When questioning witnesses, be honest about your purpose. Ask that they maintain confidentiality. Ask open-ended questions to get the most information but verify details provided. Obtain all relevant information from each witness.

9. Review all available documentation. This will vary depending on the specific circumstances of the complaint, but could include an employee handbook or other rules and policies, personnel files of the parties involved, and any other documentation of prior complaints involving any of the parties.

10. Thoroughly document all aspects of the investigation. This documentation can be used to defend an employer if a complaint develops into a court case. Documentation should be comprehensive enough to show that an employer's investigation was thorough, fair and objective. Notes should be written clearly and be objective, factual and neutral. Documentation should include: the allegations of the complaint; the date the investigation started and concluded; the names of the investigators; a list of people interviewed and documents gathered; a summary of witness statements; a summary of the response from the person accused; the investigator's conclusion as to what happened, including an analysis of the parties' credibility; and a list of any applicable company policies. If an investigation is of a more minor nature, however, such in-depth documentation generally isn't necessary. A scaled-back version -- an investigation summary in memo form for the investigative file, for instance -- will suffice. (An actual example of thorough documentation is included in Appendix D.)

11. Take appropriate remedial action where warranted. Possible remedial action might include counseling, training, referral to an Employee Assistance Program (EAP) provider or rehabilitation.

12. Be consistent in your treatment of all complainants and alleged perpetrators.

13. Follow up with the complainant within the following six months to ensure that no repeat episodes have occurred. Employers often say that they "don't want to know," but the truth is they may be liable whether or not they know of continuing problems. If a problem is continuing, the employer can take additional, stronger action to put a stop to it. If the problem has not been repeated, the employer can document that the actions complained of have ceased. Either way, checking back in with the complainant can be extremely important in avoiding liability.

Remember, once an employee has filed a claim against the employer, or engaged in opposition activity, it is crucial to:

- consider all allegations of retaliation to be serious issues;
- investigate retaliation allegations promptly and thoroughly;
- follow standard policy and procedures, if possible; and
- conduct a thorough exit interview before termination as this may uncover a potential claim or provide a defense if the employer is later sued.

The Importance of Pre-Employment Screening

Measures designed to prevent retaliation can begin as early as the interviewing and hiring process. In addition, carefully measured responses are absolutely crucial when taking disciplinary action, particularly in discharging employees. In everything from checking references to maintaining personnel files to obtaining severance agreements, employers can take special care to avoid liability for retaliation.

Employers may wish to know whether prospective employees have ever sued their past employers. For example, a potential employer might find it extremely relevant to know that a prospective employee was involved in a race discrimination claim against a previous employer. Employers often ask whether prospective employees have ever filed workers’ compensation claims. As interesting and relevant as this information may seem, however, it is off-limits. The rationale for this prohibition is that employers would be less likely to hire a candidate who had previously sued an employer.

An employer should never ask job applicants or employees about litigation or complaints against previous employers. Any actions alleging discrimination or retaliation against former employers are considered “protected activity”; no other employer can use this as a basis for treating employees differently or for failing to hire job applicants (which is why it is referred to as “protected”). For this reason, application forms, interviews, reference checks and personnel files should never include this information. In fact, even if the information is volunteered, employers and prospective employers should completely disregard it. For example, if a reference for a prospective employee states that the employee sued his previous employer for discrimination, that information should not be recorded or disseminated. If an applicant states that she is pursuing a sexual harassment claim against her former supervisor, this too should be disregarded. Only job-related questions should be asked and recorded.

Asking only job-related questions can help demonstrate that an employer did not solicit information about protected activity and didn’t act upon it. Application forms, lists of typical interview questions and lists of typical questions for reference checks can all help demonstrate an employer’s objective hiring process. All employees and applicants should be treated fairly and consistently, whether or not an employer has information about protected activity. Such even-handed treatment can help an employer demonstrate that even an employee or applicant who has engaged in protected activity was treated consistently with all other employees.

Employees or applicants may sometimes need to request religious accommodations or accommodations for disabilities. These requests also should be disregarded in making employment decisions, regardless of how the accommodations were addressed.

Managers, supervisors, and others with interviewing or hiring responsibilities must be fully trained in what questions can and cannot be asked. Also, those in charge of maintaining personnel files must be aware of what information should and should not be maintained. Only job-related information should be solicited, retained or used in making employment decisions. Managers, supervisors, and others with interviewing or hiring responsibilities should be aware of what constitute appropriate and inappropriate questions and be familiar with the information guidelines on the following pages.

The following chart sets forth both lawful and unlawful questions and types of information solicited in application forms, job interviews, reference checks and personnel files. Anyone with interviewing, reference-checking or hiring responsibilities should know what information lawfully may be sought and what cannot. Additionally, those who maintain personnel files should be aware of the types of information that lawfully may be included and what may not.

INTERVIEW QUESTIONS		
<i>TOPIC</i>	<i>LAWFUL</i>	<i>UNLAWFUL</i>
1. Protected Activity	Why did you leave previous employment?	Have you ever filed a claim or lawsuit against any previous employer? Have you

PREVENTING RETALIATION, RETALIATION Ch. 4

		engaged in any past litigation, administrative actions and/or complaints against previous employers? (<i>Note: If the employee volunteers information regarding protected activity, disregard it and do not document it.</i>)
2. Name	Have you ever worked or studied under another name?	Inquiry into any title that indicates race, color, religion, sex, national origin, handicap, age or ancestry, or marital status. What was your maiden name? Has your name ever been legally changed? Do you want to be referred to as Miss, Ms. or Mrs.?
3. Address	Inquiry into place and length of residence at current or former address.	Inquiry into foreign addresses that would indicate national origin.
4. Age	Any inquiry limited to establishing that applicant meets any minimum requirements that may be established by law.	How old are you? What year did you graduate from high school? Requiring birth record before hiring is unlawful as is any other inquiry that might reveal whether applicant is at least 40 years of age, or over 70 years of age.
5. Birthplace or National Origin	Any inquiry into foreign language proficiency if job-related.	Any inquiry into place of birth. Any inquiry into place of birth of parents, grandparents or spouse. Any other inquiry into national origin.
6. Race or Color	None.	Any inquiry that would indicate race or color.
7. Sex/Gender	Gender, <u>only</u> if it is job-related (for example, to model women's clothes).	Any inquiry that would indicate sex. Any inquiry made of members of one sex, but not the other (for example, what will you do with your children while at work?)
8. Religion/Creed	None.	What religious holidays do you observe? Any inquiry that would indicate or identify denomination or custom. Applicant may not be told of any religious identity or preference of the employer. Employer can't request pastor's recommendation.
9. Citizenship	Whether legally authorized to work in the	Whether native-born or naturalized. Proof

PREVENTING RETALIATION, RETALIATION Ch. 4

	United States. Require proof of citizenship for I-9 after being hired. Whether an applicant speaks or writes English, if necessary for the job.	of citizenship before hiring. Whether parents or spouse are native-born or naturalized.
10. Photographs	May be required after hiring for identification or security purposes.	Require photographs before hiring.
11. Arrests and Convictions	Inquiries into conviction of specific crimes related to qualifications for the job sought.	Any inquiry that would reveal arrest without conviction. In many states, any inquiry about conviction records that have been expunged.
12. Physical Condition	Any inquiry that is job-related (e.g., ability to lift 50-pound bags repeatedly with or without reasonable accommodation).	Any questions about height, weight, color of hair, skin or eyes. Will you need medical insurance? Any questions about necessary accommodations for disabilities.
13. Finances	Inquiry into personal finances if job-related (for example, a bank employee who will be evaluating customers' creditworthiness).	Any inquiry about bankruptcy, past garnishments, or home or car ownership (the EEOC states that these inquiries tend to discriminate against minorities). The Federal Bankruptcy Code prohibits employment discrimination based on the fact that a person has been bankrupt, a debtor in bankruptcy or is associated with someone who was bankrupt or a debtor in bankruptcy.
14. Education	Inquiry into nature and extent of academic, professional, or vocational training, if job-related. Inquiry into language skills, such as reading and writing of foreign languages.	Any inquiry that would reveal the nationality or religious affiliation of a school. Inquiry as to what is mother tongue or how foreign language ability was acquired. (<i>Note: The Supreme Court has said that asking whether an applicant has a high school diploma may be discriminatory, if not job-related.</i>)
15. Relatives	Inquiry into name, relationship, and address of person to be notified in case of any emergency. Inquiry into name and relationship of any relatives employed by the company.	Any inquiry about a relative that would be unlawful if made about the applicant.
16. Organizations	Inquiry into organization memberships and office held, excluding any organization, the name or character of which indicates the race, color, religion,	Inquiry into all clubs and organizations where membership is held.

PREVENTING RETALIATION, RETALIATION Ch. 4

	sex, national origin, handicap, age or ancestry of its members.	
17. Military	Inquiry into service in U.S. Armed Forces. Require military discharge certificate after being hired.	Inquiry into military service of any country but U.S. Request for military service records. Inquiry into type of discharge.
18. Work Schedule	Inquiry into willingness to work required work schedule or anticipated overtime.	Any inquiry into willingness to work any particular religious holiday.
19. References	General personal and work references not relating to race, color, religion, sex, national origin, handicaps, age or ancestry, or protected activity.	Request references specifically from clergyman or any other person who might reflect race, religion, color, sex, national origin, handicap, age or ancestry of applicant, or protected activity.
20. Marital Status, Children, Pregnancy, Child Rearing Plans, Child Care Arrangements	None.	Any inquiry into these topics.
21. Transportation	Inquiry as to whether able to work required schedule, whether transportation is available. Any question regarding ability to travel, if job-related (e.g., whether applicant has a valid driver's license if position involves driving on company business).	Any inquiry into whether person owns a car, or as to specific transportation arrangements.
22. Disability/Handicap	Can you meet the attendance requirements of this job? Can you perform essential functions of the job with or without reasonable accommodation?	What current or past medical problems might limit your ability to do a job? Are you taking any prescription drugs? Have you ever filed a workers' compensation claim? How many days were you absent from your last job due to illness? Have you ever been a patient in a hospital? Have you ever been treated for drug abuse or alcoholism?
23. Sexual Orientation	<i>(Note: Check local and state laws.)</i>	<i>(Note: Check local and state laws.)</i>
24. Smoking	<i>(Note: Check local and state laws.)</i>	<i>(Note: Check local and state laws.)</i>
25. Relocation	Any inquiry about willingness to relocate, if required for the job.	Any inquiry about spouse's attitude toward relocation.

26. Other	Any questions required to reveal qualifications for the job applied for.	Any inquiry not related to job performance that may reveal information permitting unlawful discrimination, or retaliation.

All interview questions should be job-related. Prospective employers should never seek information regarding claims, actions or lawsuits against previous employers, or regarding any other form of protected activity by the applicant, such as requesting accommodations. The following suggestions can be helpful guidelines for all managers or supervisors with interviewing responsibilities.

Check Your Knowledge

Decide whether each of the following interview questions is lawful or unlawful. (See answer key below.)

1. Do you own your own home?
2. Will the attendance requirements of the job be a problem for you?
3. Do you have young children in school?
4. Have you ever done this type of work before?
5. Shall I call you Ms. Brown or Mrs. Brown?
6. Have you ever been arrested?
7. Have you ever filed a complaint against a previous employer?
8. Will you be driving your own car to work?
9. How many sick days did you use in your last job?
10. Have you ever been convicted of a felony?

- | | | |
|----|-----------|---|
| 1. | Unlawful. | (Refer to chart on pages 48-50, number 13.) |
| 2. | Lawful. | (Refer to chart, number 12 and number 18.) |
| 3. | Unlawful. | (Refer to chart, number 2 and number 4.) |
| 4. | Lawful. | (Refer to chart, number 26.) |
| 5. | Unlawful. | (Refer to chart, number 2.) |
| 6. | Unlawful. | (Refer to chart, number 11.) |
| 7. | Unlawful. | (Refer to chart, number 26.) |
| 8. | Unlawful. | (Refer to chart, number 13 and number 21.) |
| 9. | Unlawful. | (Refer to chart, number 1 and number 22.) |

10. Lawful. (Refer to chart, number 11.)

Pre-Interview Preparation

- Formulate questions related to specific job requirements and follow this format for all interviews. Specific job-related inquiries are the most important and useful types of questions and will help avoid improper questions.
- *Always* ask why applicants are changing jobs. Investigate answers. If, however, an applicant volunteers that the change is due to litigation or a claim against a previous employer, this topic should not be pursued. Any such information should be disregarded.
- Consider carefully a change from a small company to a large one, e.g., structured vs. unstructured environment. Some employees will not successfully make these changes. Again, if the change is due to litigation or a claim against a previous employer, do not record this information. Do not consider it in making any decision.
- Always have applicants fill out *the employer's application forms*, even if you have their resumé. This is important because resumé provide information the applicant wishes to provide, not necessarily what you want or need. Further, resumé may include information about race, ethnicity, age, etc., that should not be circulated or considered in making employment decisions. Finally, applications include certifications of truth and release language, as well as at-will statements. Resumé do not include this important language.
- Always have applicants fill out the forms in your office, especially for entry-level positions. This is a simple and easy way to test for basic literacy.
- Always ask whether an applicant is subject to a non-compete provision or other work-restricting agreement. This helps to avoid, or at least makes you aware of, potential litigation against the employee and/or you as the new employer.

Interviewing Techniques

Interviews usually reveal one thing very clearly -- how well a person interviews. They do not necessarily reveal whether the applicant will be a successful employee. It is important to remember that if you make a mistake in hiring and have to fire someone within the first six months, the cost is high. One of the lowest estimates of cost is twice the salary for the position.

Most interviewers make up their minds in the first four minutes. This reflects the importance our culture places on first impressions. Unfortunately, the rest of the time is wasted as the interviewer merely works to confirm his or her opinion.

With these facts in mind, the interviewer's goal should be to talk only 20 percent of the time. The interviewee should talk most of the time. If the interviewer talks most of the time, the interview will not be particularly useful. The more *you* talk, the more you like the candidate (who has served as a good audience for you), but what will you have learned about whether the candidate will make a good employee?

You should expect short answers at first, because the interviewee may be nervous. However, simply waiting and encouraging the candidate to talk should achieve the desired results.

The following interviewing tips may help to elicit useful information:

- Use questions *sparingly*.
- Use verbal and non-verbal cues like "yes," "uh huh," and "I see," nodding and repeating the candidate's words to encourage them to continue.
- Don't rush to fill in gaps of silence.

Open-Ended Questions

Interview questions should be open-ended. Also, the best predictor of future success is past performance. Questions relating

to actual past performance are better than hypotheticals because it is harder to make up answers. Be sure to ask for plenty of details. Some examples of open-ended questions dealing with past performance include:

- What led you to choose the college/major you chose?
- If you could relive your college/last ten years, what would you do differently?
- Can you give me an example of your ability to manage others?
- What are some of the things you have liked/disliked in past jobs?
- What was the most frustrating problem you encountered on a job?
- Tell me about your current/past job.
- Have you ever had to fire anyone? Tell me about it.

Self-Evaluation Questions

Self-evaluation questions are also useful in assessing potential candidates. Examples of these include:

- How would you describe yourself?
- Why do you think you are successful?
- Why do you think you got such good grades/were so successful?
- If I were to call your supervisor, what would she say about you? (This is a particularly good question because applicants know you may very well call.)

Do's and Don'ts in Interviewing

- Do encourage candidates to *think* before they answer -- the longer, the better, as their answers are apt to be more relevant. Provide an environment in which thoughtful silence is not uncomfortable.
- Do *listen*. Don't be so concerned with formulating your next question that you miss the answers to your questions.
- Don't be afraid to *express concerns* with each candidate (don't wait until they're gone). In one interview for an executive director position, interviewers had discussed their concerns about the candidate's lack of previous supervisory experience. Their concern centered around whether she possessed the necessary leadership skills. When they expressed their concern during an interview, she shared information about her experiences as team captain and coach of various high school and college athletic teams, with ample examples of her leadership skills. This information was not in her resumé, and if the interviewers had not addressed it with her, they would not have had the benefit of this information. She was chosen for the position and was extremely successful.
- Don't sit behind your desk. This does not facilitate open communication.
- Don't think of the purpose of the interview as digging up dirt; help each candidate make the best case. This way you will be comparing all candidates at their best.

Value of Interview Notes

Notes are extremely helpful in the interview process. Carefully recording your perceptions and thoughts, as well as some of the candidate's answers, will assist you in making the best selection.

Because it is impossible to recall everything said in an interview, especially when considering multiple candidates, notes can help you recall important information. Both positive and negative notes should be recorded. This is especially true in areas where you are unsure or have doubts. Don't write so much, however, that you become distracted or distracting. In addition, never write on application forms or on resumé; keep your notes separate from these documents.

Immediately after an interview, review your notes and clarify or expand upon them as necessary. Then review and discuss any concerns you may have had about the interviewed candidate. Ideally, you will have addressed these concerns directly with the interviewee.

Notes can be discarded after a decision is made, but recordkeeping requirements do not permit the destruction of applications. In fact, applications are often maintained indefinitely as part of an employee's personnel file.

Importance of References in Hiring

Checking references is a frustrating process for employers, yet it is one of the most important pieces of the hiring process. Former employers are often reluctant to share information because of fear of a possible defamation claim if negative information is provided. However, the truth of the information provided (whether negative or not) is almost always a complete defense to a claim of defamation. Also, most states have enacted statutes offering protection from liability for employers who give references in good faith. And in fact, employers can even be sued for a false reference or references that don't fully disclose pertinent information.

Interviewing Exercise

With the above mentioned guidelines in mind, develop answers to the following questions. After you have drawn up questions, use them with a partner or in small groups. See how much you can get them to talk, as you listen carefully and take appropriate notes.

1. Think of three questions that would be lawful, job-related and useful in an interview.
2. Think of three questions that are designed to get the most information from a prospective employee.
3. Think of three questions that would be lawful and useful on an application form.
4. Review your company's application form and identify any problems it contains.

One example of this involves an employee who was fired from his job at Allstate Insurance Company for carrying a gun to work and threatening co-workers. Yet, the company's letter of reference claimed he was ousted because of "corporate restructuring." He had even received a four-month severance package. The employee landed a job at Firemen's Fund, subsequently lost the job and then gunned down three Firemen's Fund executives as they ate lunch at a cafe. Family members sued Allstate over the misleading reference and garnered an undisclosed settlement.¹

In another case, two school districts gave glowing recommendations to a former vice principal without disclosing that he had been charged with sexual misconduct and impropriety. Those letters persuaded another school district to hire the man, who later sexually assaulted a student. The family of the student sued the former employers over negligent misrepresentation and fraud, and the California Supreme Court held them liable.²

However, employers may provide negative job references in any situation, as long as they are truthful. In addition, to avoid a claim of retaliation, even a truthful negative evaluation must not be a "pretext." In other words, a truthful negative evaluation may not be a disguise for retaliation. This could be the case in a situation where an employer's policy is that no reference information, or only minimal information, is given for past employees. However, if the employer makes an exception, in contravention of its policy, and provides negative (even though truthful) information regarding an employee who has engaged in protected activity, this could be a pretext for discrimination. Truth would not be a complete defense in that situation.

One area of exception to truth as a defense results from the laws prohibiting retaliation. If an employer provides information that an employee has engaged in protected activity, the employer may be liable for retaliation, even if the employee still gets the job.³ The safest course of action is to provide only truthful, objective, job-related information. Information about an employee's participation in protected activity should never be shared with prospective employers or others seeking references.

In another case involving references, Phillips School of Business and Technology was asked for a reference for a former employee, Otha Lee Fields. Fields had been terminated by the school and subsequently had filed a charge of race discrimination against the school under Title VII. The school completed a standard reference form from the prospective employer, checking boxes indicating that Fields was "below average" in several categories and that she was terminated due to tardiness and insubordination. The school made no reference to Fields' Title VII charges. The court held that because the school relied on personal observations and its business records in completing the form, no malice or ill will on the part of the school was demonstrated, and no claim for retaliation could be made.⁴ This case shows how providing truthful, documented information (and not providing information about protected activity) in response to a request for a reference can be effective and safe for employers.

Of course, when you are seeking references, you want to obtain as much information as possible. Even though you cannot ask about past or current protected activity, much information can be gathered through a thorough, diligent reference process. Creativity is also useful. Some creative questions might include the following:

- “Would you rehire this person?”
- “I know you can’t answer [a given question], but if you could, what would you say?”
- “I’d really like to consider this person for a job, but I can’t because I’m concerned that there must be something negative in their work history if you can’t share any information.”

Try Different Routes for References

When contacting current or past employers, contact the supervisor, not the human resources department (request the supervisor’s name on your application). Typically, only human resources personnel are familiar with their company’s policy on giving references; contacting a supervisor may yield more information.

In contacting supervisors for references, the higher up the chain, the better. Senior officers are often unaware or unconcerned with reference policies and consequently are more likely to provide information.

Attempt to get references from references. Ask each reference that the prospective employee has provided for at least one additional reference. These people may be quite knowledgeable about the candidate and more apt to provide information. They are not anticipating your call and may be quite open and honest.

Tips on Giving References

1. Establish a clear policy on how to provide information to other employers, identifying those employees authorized to release information. No matter what the policy, all employees must be aware of it and abide by it. Supervisors who are unaware of the policy or who do not understand the importance of a reference policy can create big problems for employers.
2. Be consistent with the type of information conveyed. If an employer’s policy only allows disclosure of dates of employment, final position and salary, make sure that *no* other information is provided. Giving additional information for “good” employees creates by implication a more negative reference when only minimal information is provided for other employees.
3. Make sure you know whom you are speaking to and that it is someone with a legitimate right to know. Ask for reference requests in writing on company letterhead or take a telephone number and call back. Do not simply respond to phone calls from an unknown person. Potential plaintiffs quite often engage a third party to pose as a prospective employer to see if negative information is provided. A Houston insurance agent hired a private investigator who was told by the agent’s former employer that he was a “classic sociopath,” a “zero” and that he lacked scruples. Of course, none of this was or could have been documented objectively. The former employee was awarded \$1.9 million by a jury.
4. Keep a written record of who gives references, to whom and when.
5. Give references only if the employee in question has provided a written release. Note that in many cases, the Fair Credit Reporting Act requires a separate, specific release. Check with counsel to see if this law applies. (*Note:* The act’s provisions are not limited only to credit checks.)
6. Convey only job-related information, preferably that which has been documented.
7. Make sure the information is factual and objective.
8. Don’t be malicious.
9. Answer questions but don’t volunteer opinions. Remember, “off the record” is a media concept, not one that is applicable in this context.
10. Whenever possible, put the reference in writing to help maintain control over what is communicated.
11. If the request concerns a former employee involved in a claim or litigation against the company or a former employee whom you think may be dangerous, talk with your attorney about what to say and how to say it.

Personnel Files: What to Keep?

Those employees in charge of maintaining personnel files should be careful to ensure that no unlawful information is included in the files. In terms of retaliation, this means that any information about protected activity should not be included in an employee’s personnel file. Some examples of protected activity information that should not be maintained in a personnel file include the following:

- Equal Employment Opportunity Commission (EEOC) or other administrative agency documentation of a charge filed by the employee;
- copies of a subpoena by a court or administrative agency;
- investigative documentation of complaints of unlawful activity in the workplace;
- workers’ compensation claim records;
- requests for religious accommodation; and
- requests for accommodation of disabilities.

This is not to suggest that this type of information should not be maintained, but only that it be maintained separately from personnel files.

The reason for excluding this information from personnel files is that in making employment decisions (such as assessing qualifications for promotion, conducting periodic evaluations, providing training opportunities, or administering discipline), presumably the decision-makers refer to personnel files. Therefore, the files should not include any information that would be unlawful to use in making employment decisions, including information on an employee’s participation in protected activity, race, disabilities, etc. (For a more detailed discussion of unlawful information, see material on the importance of pre-employment screening earlier in this chapter.) Keeping this type of information separate from personnel files helps to show that decision makers didn’t take it into account, specifically in reaching negative employment decisions. Conversely, if unlawful information is included in the file, it will be presumed to have been taken into account in making a negative decision. This will assist a plaintiff in developing circumstantial evidence to show that an employer’s justification for taking action was merely a pretext for retaliation or discrimination (as discussed in Chapter 2).

Too often, employers seem to believe that personnel files are actually kept for the benefit of employees. For example, employers may think that an employee’s file should be a complete record of employment carefully maintained by the employer for the benefit of the employee. Employers often keep every document regarding every employee. This is actually the opposite of what an employer’s goal should be. Employers should consider personnel files to be carefully maintained *company* records, kept for the sole and exclusive benefit of the employer. They should be as carefully maintained and safeguarded as financial information, tax records, or any confidential or trade secret information. Access should be limited and files should be locked. Properly maintained personnel files can be extremely helpful in litigation. Overinclusive files can be devastating.

The following list is a summary of what personnel files should and should not include. Several items require explanation. Again, keep in mind that the items on the “Should Not Include” side of the list may be maintained by the employer, but not in the personnel file.

EMPLOYEE PERSONNEL FILES	
<i>SHOULD INCLUDE</i>	<i>SHOULD NOT INCLUDE</i>
• Signed employment contract or signed handbook receipt	• I-9
	• Self-Evaluation Forms or “Responses” to

• Emergency contacts	
	• Any information that could be viewed as
• Job information	the basis for discrimination
- promotion, demotion, layoff,	
transfer, bids	• EEO/Affirmative Action records
- seniority	- Post-hire information
- training and education	- Declaration of disability
	- Complaints of discrimination and
• Fingerprints (if necessary, e.g., for security)	investigation material
• Photographs (only if necessary, e.g., for	• Requests for religious accommodation
security)	
	• FMLA request forms and related forms
• Payroll information	
	• Requests for accommodations for disabilities
• Certificates or licenses required for the job	
(e.g., valid drivers license for drivers)	• Documentation for absences due to “participation”

	in any investigation, hearing or
• Exit interview	litigation of a charge of discrimination or
	other illegal practices
• Termination report	
	• Any other evidence of “protected activity”

Most employers maintain performance evaluations or reviews in personnel files, but note that the list states that no more than two should be maintained. Most employers keep these documents indefinitely, so that an employee employed for ten years may have ten or more evaluations. This is never helpful and can be extremely harmful.

An example can demonstrate the problem. Suppose an employee has been fired for poor performance and claims that the real reason was retaliation for filing a claim of race discrimination. The personnel file is requested by either the EEOC (or state administrative agency) or by the plaintiff’s attorney in litigation. It includes the past six years of performance evaluations. Supervisors are generally reluctant to properly document poor performance, or to be too critical. Therefore, the five earliest performance reviews show average performance, which is also the rating a poor performer is most likely to receive. “Average,” in a juror’s mind, or the mind of an agency investigator, is not substandard. So it might appear that the only “bad” performance review was the final one, which also came after the employee complained of race discrimination. Even if the employee’s performance was substandard, this will be good circumstantial evidence for the employee. The employee or the employee’s attorney will argue that the employee’s performance reviews were fine, year after year, until the employee complained of the discrimination.

What if, in fact, the employee’s performance was consistently bad throughout the years, even before the claim of race discrimination? And what if that poor performance was properly documented? Then, wouldn’t it be helpful to show that for six years the employee performed poorly and documentation of this did not change after the race discrimination charge? In this case too, maintaining all these evaluations would be harmful rather than helpful. If it is true that the employee was a consistently poor performer for all six years, why then was the employee fired only after complaining of race discrimination?

As has been demonstrated, large numbers of performance evaluations are never helpful. Two prior evaluations are the most that should be maintained; one is actually sufficient and preferable. Also, if managers track performance and document whether a prior performance or disciplinary issue has been resolved, this will provide ample “history” for the next review period. Personnel files should all be purged of excess performance evaluations. The one exception to this arises where an employer knows or is reasonably sure that an employee has filed or intends to file a charge or lawsuit against the employer. In this case, no documentation concerning that employee should be destroyed or deleted.

Also, employee self-evaluations or “responses” to performance evaluations should not be included in personnel files. This is evidence that may be helpful to employees in disputing negative performance evaluations. Self-evaluations can be useful in the performance review process, but should not be maintained by the company. They may support an employee’s case against the employer and maintaining them in company files gives them a presumption of credibility. Employees often want to respond to performance evaluations, especially those that are critical. Employees may wish to write notes to their files; some performance evaluation forms even include a section for an employee response. If an employee has “explained,” justified or disagreed with an evaluation, maintaining that documentation in the company’s personnel files only strengthens the

employee's case and weakens the employer's.

Of course, attendance records are appropriately maintained in personnel files. However, care must be taken to remove documentation of reasons for absences that include unlawful information. Examples of this type of documentation would include medical records or doctors' excuses that refer to disabilities or records of requests for days off for religious observances. In terms of retaliation, subpoenas for witnesses in discrimination or other proceedings against an employer would also be unlawful information.

Two other items on the following list require some explanation. Note that "records of achievements, honors, community service" and "letters of praise or commendation from customers or other third parties" are included on the list of items that should not be included in personnel files. This often comes as a surprise to employers. However, once an employer understands that personnel files are company records, for the sole and exclusive benefit of the employer, the rationale becomes clear.

You can imagine the impact on a jury of a personnel file that includes several glowing letters from customers and various awards for charitable work. The employer wants to argue that the employee was fired for poor performance or for disciplinary problems. The employee wants the jury to believe that the employer's stated reasons are not true (see discussion of pretext in Chapter 2). The employer actually provides its own company records, which show that the employee is loved by customers and is a good person. The employer is placed in the position of actually supporting the employee's case against it with its own company records. This is obviously not the intended purpose or desired effect of personnel files.

When employees receive honors, awards and favorable letters from customers, these are occasions for which employees deserve recognition. The employer wants its employees to be recognized in these ways. Simple words of acknowledgment, posting the items on the company's bulletin board or web site, or writing about these items in the company newsletter are just a few ways in which to recognize deserving employees. The awards, letters and other documentation can then be given to the employee.

If the employee saves and later uses these documents to support a claim against the employer, they will be far less helpful to the employee. A jury or judge will expect the employee to provide self-serving support for his or her claim. This will be far less damaging than if the employer maintains the documentation as part of its official company records, especially those that are specifically used in making employment decisions. In fact, the employer's records are given special status as evidence because of a presumption of reliability and authority. Those records should never provide any support for an employee's claim against an employer.

If an employer decides to remove materials from personnel files, it must do so consistently. In other words, if you decide to maintain only one performance evaluation, remove all others from all employees' files. Do not maintain additional performance evaluations for a particularly bad employee, for example. Also, once documents are removed, they should be destroyed. Storing them offsite in cardboard boxes still means that they are maintained as company records. Most importantly, when purging or removing any records from personnel files, never remove or destroy anything from an employee's file if that employee has filed a charge or complaint against you, or if you have reason to believe that will occur. (See Appendix D for a sample personnel file.)

Disciplining Employees After Protected Activity

"Aren't employees 'at-will'?" an employer might ask. "Doesn't our company handbook say that they can be fired at any time, for any reason or for no reason?" Most states have at least some at-will employment protection for employers. At-will employment means that employees or employers may terminate employment, at any time, with or without cause or notice. Some exceptions to this doctrine exist, however, and the doctrine never permits unlawful retaliatory discharge or discriminatory discharge. To maintain the protection of the at-will doctrine to the extent possible, at-will language should be included in bold or capitalized language in application forms, handbooks and other documents provided to applicants and employees.

Even when employers have taken all precautions to protect the at-will status of employees, retaliatory discharge is still prohibited. Exceptions will be made to the at-will doctrine to prevent retaliation regardless of the reason for discharge.

This can lead to surprising results. For instance, one court has held that a pharmacist could not be fired even though his pharmacist license had expired. The pharmacist had been told that he was being fired because his license had expired. However, he had recently complained to his employer (and threatened to complain to the FDA) about improperly stored drugs in the pharmacy where he worked. He argued that he was fired in retaliation for his complaints. The court held that the employee's complaints and threats created a "public policy" exception to the District of Columbia's employment-at-will doctrine. The court held that if internal complaints such as this one were not protected, this would "create perverse incentives" to avoid reporting problems. An employee would be forced to choose between continuing to work for an employer that is violating the law or losing his or her job. This is a choice that employees should not have to make, said the court.⁵ Employers should always carefully justify and document legitimate reasons for discipline and discharge to avoid a similar situation.

Employees who have engaged in protected activity may still need to be disciplined or discharged. Sometimes the reason for discipline or discharge will become apparent as a result of participation in protected activity. For example, an employee might admit to some illegal activity while testifying in a court proceeding, as in *Merritt v. Dillard* (see discussion in Chapter 2). The employer might then have a legitimate basis for discipline or discharge, but the employee would be protected from retaliation.

How can employers avoid liability in these situations? In addition to following the general guidelines for disciplining or discharging employees (see discussion of corrective discipline later in this chapter), employers should take these additional precautions when considering discipline or discharge of employees who have engaged in protected activity:

- Ensure that any discipline or discharge is not based on the employee's protected activity.
- In communicating with the employee, make it clear that the discipline or discharge is based on the misconduct or unacceptable performance.
- Carefully document the reasons for the discipline or discharge, as well as all communications with the employee.
- Have a witness who can verify what was communicated to the employee and who can also document the conversation with the employee.

In disciplining employees, care should be taken to do so fairly to minimize or avoid any potential claims an employee might have, especially potential retaliation claims. Employers should strive for consistency, treating similar situations similarly. Performance objectives should be communicated clearly to employees. Employers should give and document feedback and provide constructive criticism. Employees must have knowledge of rules and warnings so they can make a full effort to comply with them.

Carefully document all employment decisions involving adverse actions, especially discipline and discharge situations. Attempt to treat all employees fairly and in the same way, regardless of whether they have engaged in protected activity. Never take any adverse action, or discipline or discharge an employee (or fail to hire an applicant) simply because he or she has engaged in protected activity. Document all disciplinary incidents and unacceptable performance. This will provide evidence of the employer's justifiable, legitimate reasons for taking adverse action against an employee. Proper documentation can refute the employee's claim that the adverse action was retaliatory. This is always good practice but becomes especially important when taking adverse action against employees who have engaged in protected activity.

Positive Steps to Corrective Discipline

1. Get all the facts in each and every disciplinary investigation. Don't assume anything is true. Be as fair and objective in an investigation as possible.
2. Check past practice and act consistently.
3. Determine what step or stage of the disciplinary progression the employee is within and follow the prescribed steps exactly, if applicable.
4. Perform the disciplinary action in private.
5. Avoid distractions and interruptions.
6. Specify the reasons for the actions taken. Don't be vague.
7. Get the employee's side of the story directly from the employee, and determine if there are any mitigating or compounding circumstances that could affect your preliminary decision.

8. Try to determine whether the employee's behavior calls for some form of assistance or rehabilitation, rather than discipline.
9. Establish future consequences. In doing this, the language should always include the words, "further discipline, up to and including termination."
10. Carefully document the reason for discipline and explain future consequences that can be anticipated if performance does not improve. If further discipline or discharge is a possible consequence, make that clear to the employee. Even "verbal" warnings or reprimands should be documented in an employee's personnel file.
11. Follow up with the employee as to continuing problems or improvements in performance.
12. If discharge is necessary, the employee should be discharged with dignity. Don't be vague. Give guidance on what happens next. Don't give the employee false hope that a decision may be reversed. The employee may have to go home and face a spouse or family who will have many questions. Try to give the employee as much information as possible about such things as continuation of health care coverage, manner and timing of final pay, etc. The chance that an employer will be sued depends largely on how the discharge is handled and the employee's ability to find a new job. The employer is in complete control of the former, and should do its best to help the terminated employee preserve his or her dignity.

When discipline is required, employers must be sure that it is reasonable. Employers should consider the nature of the offense, the employee's prior employment history, and whether the "punishment fits the crime." Some conduct is so serious or extreme that immediate discharge is the only solution. Applicable policies must be considered, as well as past practice in similar situations. If a formal, progressive disciplinary policy exists, the employer should follow it to the letter.

When disciplinary action is warranted or when poor performance needs to be addressed soon after participation in a protected activity, employers become especially concerned about potential liability for retaliation. Management may be reluctant to address these important issues for fear of a claim of retaliation. Do not delay justifiable adverse action. Be aware of the timing of the adverse action in relation to the protected activity, but don't necessarily change it.

While precautions can never ensure that an employer won't be sued, important actions can be taken to avoid liability. As always, fair and consistent disciplinary practices will go a long way in protecting employers from all types of employment claims, not just retaliation claims. Certain procedures should always be followed -- even in at-will employment states where employees and employers theoretically can terminate employment at any time with or without reason or notice -- and are especially important in avoiding potential retaliation claims.

The Effect of Severance Agreements and Releases

Employers often obtain releases of liability or severance agreements from departing employees as another avenue to avoiding liability for any possible employment claims. The purpose of these releases or agreements is to give some benefit to the departing employee in return for the employee's agreement not to sue the employer. This promise not to sue can encompass all potential claims of discrimination or retaliation. Consequently, this is a good preventive measure and, when entered into after consultation with legal counsel, can help avoid lawsuits by employees.

Several important legal issues are involved in any attempt to get a release, so legal counsel should always be consulted. No release or severance agreement should be used unless it has been drafted or approved by counsel.

An additional problem arises concerning retaliation. The EEOC and several courts have said that no release or severance agreement is effective in prohibiting an employee or former employee from filing a charge with the EEOC or from assisting or participating in an EEOC investigation. In other words, even though an employer has paid money or provided some additional benefit to an employee in excess of what the employee may have been entitled to under company policy or procedures and the employee has agreed not to sue the company, the employee may still bring an EEOC charge against the employer, even on the very same issues for which the employee released the employer from liability.

This result may seem surprising, but several points should be considered. First, the EEOC acts in large part to protect not only private parties, but also the public interest and national policy favoring the prevention of employment discrimination. If certain individuals were prevented from assisting the EEOC, the EEOC's mission would be thwarted in many cases. Second, these releases and severance agreements would have a chilling effect on employees' willingness or ability to provide the

EEOC with information. And finally, under both Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA), the EEOC may not begin any investigation without at least one actual individual charge. (Under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA), however, the EEOC may investigate without a charge.)

Employers might be asking why they should pay money or provide a benefit to obtain a release when employees can still sue. One very good reason remains. Even though an employee would not be prevented from filing an EEOC charge, an employee would be prevented from recovering any additional money or benefit from the employer. In other words, an employee may not waive the right to file a charge with the EEOC but may waive the right to any recovery in such a proceeding.

Careful drafting can accomplish this necessary balance. For example, the following sample language achieves this balance:

Employee releases the Company, its affiliates and any successors, directors, employees, agents, and assigns from any and all claims, actions, causes of action, claims for relief, damages and demands which Employee now has or may have against the released parties arising out of employment or the termination of employment, including any possible claims, rights or causes of action arising under the Age Discrimination in Employment Act or the Older Workers Benefit Protection Act, any other claim of discrimination on any basis, any contract claim or any claim of defamation. Employee agrees not to prosecute or pursue any claim against the Company that this Release purports to cover. Notwithstanding the foregoing or any other provision of this Agreement, this Release is not intended to interfere with Employee's right to file a charge with the Equal Employment Opportunity Commission ("EEOC") in connection with any claim Employee may have. However, by executing this Agreement, Employee waives the right to any recovery in any such proceeding, or in any state civil rights commission proceeding, or in any proceeding brought by the EEOC or any state civil rights commission on Employee's behalf. This Release is a release of both known and unknown claims. This Release does not extinguish any rights or obligations arising under this Agreement. The Company expressly denies any liability or alleged violation. Payment is made pursuant to this Agreement solely for the purpose of compromising any and all claims without the cost and burden of litigation.

This contractual language and any additional release language should be drafted or carefully reviewed by a qualified attorney. Preferably, the attorney should have some experience in this specific area of the law since a general release will be ineffective. Strict compliance with the various laws affecting these types of releases is necessary for a valid release.

In fact, the EEOC has said that agreements attempting to require employees to promise not to file EEOC charges or to participate in EEOC investigations may themselves be distinct violations of discrimination laws.⁶ So failing to acknowledge an employee's right to file a charge with the EEOC with language such as is provided above may in itself subject the employer to liability for retaliation.

Employers should also note that a release cannot protect against future claims or claims that have not yet arisen and that the employee is therefore unaware of. This means that claims for post-employment retaliation cannot be released. Only past or current claims can be released.

(2004)

Footnotes

^a **Patricia A. Wise** is a co-founder of the law firm of Wise & Dorner, Ltd., and the founder of Wise People Management, Inc., a human resources consulting firm.

¹ *Jurner v. Allstate Insurance Company*, Civ. No. 09472 (Fla. Cir. Ct. 1995).

² *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997).

³ *Robinson v. Shell*, 519 U.S. 337 (1997).

⁴ *Fields v. Phillips School of Business and Technology*, 870 F. Supp. 149 (W.D. Tex. 1994), *aff'd mem.*, 59 F.3d 1242 (5th Cir. 1994).

⁵ *Liberator v. Melville Corp.*, 14 IER Cases 1545 (D.C. Cir. March 16, 1999).

⁶ EEOC Notice No. 915.002 (April 10, 1997).

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

MACDONALD HOAGUE & BAYLESS

August 22, 2017 - 12:48 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94209-9
Appellate Court Case Title: Jin Zhu v. North Central Educational Service District - ESD 171

The following documents have been uploaded:

- 942099_Briefs_20170822124420SC458195_9973.pdf
This File Contains:
Briefs - Amicus Curiae Additional Authorities
The Original File Name was 20170822 Zhu WELA Add Authorities.pdf

A copy of the uploaded files will be sent to:

- abiviano@pt-law.com
- bonitaf@richter-wimberley.com
- danhuntington@richter-wimberley.com
- djohnson@bjtlegal.com
- esmeraldav@mhb.com
- jbaker@jmlawps.com
- jeanw@atg.wa.gov
- jmoberg@jmlawps.com
- jneedlel@wolfenet.com
- jtelegin@bjtlegal.com
- matt@crottyandson.com
- matthew.z.crotty@msn.com
- mike@michaellovelaw.com
- rabi.lahiri@gmail.com
- sank@mhb.com
- talner@aclu-wa.org
- valeriemcomie@gmail.com

Comments:

Sender Name: Jesse Wing - Email: jessew@mhb.com
Address:
705 2ND AVE STE 1500
SEATTLE, WA, 98104-1745
Phone: 206-622-1604

Note: The Filing Id is 20170822124420SC458195