

UPDATE ON LEGAL ISSUES

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- I. Adverse employment actions
 - A. Federal claims employee must establish a causal link between the employment action and the claim—decision maker must know about the complaint and employment decision would not have been imposed but for engaging in the protected activity. *Eugene v. Rumsfeld*, 168 F.Supp.2d 655, 668 (D.C. S.D. Tex. 2001).
 - B. Texas Commission on Human Rights, do not need to show that protected activity such as gender was sole or even substantial reason for employment action, only that it was a motivating factor in the employer's decision. *Ysleta Independent School District v. Monarrez*, (Tex. App—El Paso 2002); *Quantum Chemical Corp v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001).
 - C. In both instances, employee then must rebut employer's alleged legitimate, nondiscriminatory reason.
 - D. Employer must show that there was a legitimate reason for the employment action—must show that would have taken the employment action for reasons not related to the employee engagement in protected activity.
 1. Fifth Circuit requires adverse employment action to be an “ultimate employment decision,” i.e. hiring, granting leave, discharging, promoting and compensating. *Foley v. University of Houston System*, 355 F.3d 333, 340 (5th Cir. 2003).
 2. Whistleblower Act defines personnel action any that affects compensation, promotion, demotion, transfer, work assignment or performance evaluation—so includes reprimands, warnings, missed pay increases, etc.
 3. *Key v. Lockhart Independent School District*, Tex. App.—Austin 2004, Key was rified after returning to work from a workers' compensation absence. He was advised that his position was eliminated as part of the budget balancing cuts. There were two positions and the school kept the most senior person instead of Key. His original letter giving notice of reasonable assurance of continued employment dated June 8 had clause that the assurance is contingent on continued school operations and would not apply in event of any disruption beyond the control of the district—lack of school funding, natural disaster, etc.) Court found in favor of the school based on its legitimate non-discriminatory reason—budget cuts.
 - 4.
- II. Retaliation
 - A. Practically every state and federal statute have anti-retaliation provisions: Title VII, ADEA, ADA, FMLA, Workers' Compensation, Texas Whistleblower (Labor Code §554.002 et seq.); Texas Labor Code §21.055 provides that an employer commits retaliation if discriminate against a person who opposes a discriminatory practice; makes or files a charge; files a complaint or testifies, assists or

participates in any manner in an investigation, proceeding or hearing.

1. An employee must demonstrate that had at least a reasonable belief that the practices she opposed were unlawful and that the opposition to perceived unlawful activity was a motivating or determining factor in the adverse employment action—must be a causal connection. *Eugene v. Rumsfeld*, 168 F.Supp.2d 655, 680 (D.C. S.D. Tex. 2001). The employee does not need to prove that the protected activity was the sole factor in motivating the employer’s challenged decision—just has to show that the adverse action was based in part on the knowledge of the employee’s protected activity. *Eugene* at 682.
 2. *Parker v. J. C. Penney Company*, (Tex. App.—Dallas 2005) the employee was removed from an acting trial supervisor and returned to her specialist position with no reduction in pay or employment level. Claimed discrimination on base of race and gender. Employer claimed not cooperative, her supervisees resigned because she was too difficult to work with. Did not raise claim of retaliation in her TCHR charge, so could not raise in court.
- B. Currently we see many more claims of retaliation and they are successful, even when the underlying discrimination or whistleblower claim fails.
- C. Complaint of discrimination does not have to be for person complaining—can complaint for discrimination of another person can be basis for retaliation
1. These complaints should be referred to Human Resources for investigation

III. Documentation

- A. Adequate written notice of poor performance or violation of policies.
1. Should put employee on notice of problem.
 2. If not severe enough for immediate termination, should provide a reasonable opportunity to improve
 - a. Regular evaluations should focus on deficiencies.
 3. Should indicate whether further violations of same type will be cause for termination or demotion
 - a. Discipline should be consistent with warnings previously received
- B. Also need documentation for rejection of hiring and/or promotion. In *Ibezim v. Texas Department of Health*, (Tex. App.—Austin 2004), Department showed that employee was not qualified by presenting job posting, the interview test scores and answers to questions as compared to those of the persons who were hired. In *Eugene* the decision to implement a RIF was made prior to the employee’s filing a grievance or lodging a complaint and the employee simply was not eligible for the job she was seeking—job was open only to current employees with a bachelor’s degree and displaced employees who were separated from a position with promotion potential to the GS-11 level. Also had evidence of inability to work independently, inability to work without supervision and inability to understand basic concepts.

