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What Schools Can Do, Aside from the Obvious, to Protect Themselves from Retaliation Claims

Bryan P. Dahlberg

Author Contact Information:

Bryan P. Dahlberg
Schulman, Lopez, Hoffer & Adelstein, L.L.P.
San Antonio, Texas

bdahlberg@slh-law.com - www.slh-law.com
210.538.5385

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I. Overview of Employment Retaliation

Employment retaliation occurs when an employer takes an **adverse employment action** against an employee **because** that employee has engaged in a **protected activity**.

There is no general law in Texas that prohibits all forms of employment retaliation. Rather, several different state and federal statutes give rise to distinct causes of action based on the nature of the protected activity.

Some of these anti-retaliation statutes are coupled with anti-discrimination laws, which prohibit taking an adverse employment action against an employee because of their status or membership in a protected class. Other anti-retaliation statutes are coupled with laws that provide certain employment protections, like guaranteed leave or the ability to organize a union, and a few more statutes stand entirely on their own.

A. Retaliation Claims Are On The Rise, And Are Costly To Defend

Retaliation claims have been on the rise over the last several years, and they are now the most common type of claim filed with regulating agencies like the EEOC and Texas Workforce Commission. Recent data published by the EEOC shows that 45% of all charges filed nationally during the 2015 fiscal year alleged some type of retaliation. In 1992 that figure was 15%. In Texas, the percentage is even higher at 46%. The number of retaliation charges filed has continued to increase on a year-by-year basis, even though the total number of charges filed has decreased over the last five years.

This represents an explosion of retaliation claims being litigated in state and federal courts. Retaliation claims are popular because the basic elements of a claim are so easy for a plaintiff to make out. There are several statutes that protect various types of activity, 22 of which apply to Texas school districts, as discussed below. Likewise, the definition of what constitutes an “adverse employment action” for purposes of retaliation claims is generally broader than it would be for a discrimination claim.

Retaliation claims are also on the rise because they are considered comparatively difficult for an employer to win at the preliminary stages of

litigation. Conversely, a retaliation claim is easy for jurors to understand and sympathize with, as it is easier to believe that an employer might want to retaliate as a means of controlling employee dissent, than to believe an employer would intentionally discriminate. Because of this, retaliation claims are thought of as a ticket to trial, which makes them costlier to defend and settle.

This is a huge area of potential exposure. Even if an employer did nothing illegal, it takes considerable time and effort to defend against one of these claims. It is even more costly for an employer that loses a retaliation claim. Damages available to victorious plaintiffs include lost wages and compensation for pain and suffering. Most retaliation statutes provide for an employee to be reinstated to his or her position, but courts have the ability to award future lost wages if they think reinstatement would be impossible or unreasonable, perhaps due to animosity between the parties, or if the position is no longer open. Even for a modestly compensated employee, damage awards against a losing employer can easily eclipse a million dollars when salaries are multiplied over several years. To top it all off, these statutes allow for a plaintiff to recover costs and attorneys' fees, which alone can be staggering after years of litigation.

B. Employers Can't Eliminate Risk, But They Can Protect Themselves

This trend should strike fear in the heart of any employer that manages a large number of employees, and especially ones that evaluate those employees using subjective standards. If it hasn't happened already, the school district you represent will eventually be sued for retaliation. Section I of this paper defines key concepts that are the backbone of retaliation claims, identifies the various statutes that prohibit it, and briefly outlines the life of a claim before it becomes a lawsuit. Section II discusses two big issues currently before the courts that will have a huge impact on Texas school districts facing retaliation claims. Section III is a survey of recent holdings from Texas and Fifth Circuit courts. Finally, Section IV identifies a number of recommended practices for employers that double as factors for attorneys to highlight when defending a retaliation claim.

C. Key Terms Defined

1. **"Protected Activity"** – The specific actions that are protected will be defined in each of the several statutes that prohibit various types of retaliation. Generally speaking, protected activity includes making a complaint to a regulatory body, opposing a discriminatory or unlawful practice with an internal complaint, participating in an investigation or proceeding, or taking action to secure a right or privilege that is protected by law.

Also available as part of the eCourse

[Employment Issues in School Law](#)

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