

RETALIATION

Tennessee Human Rights Commission 2015 Employment Law Seminar

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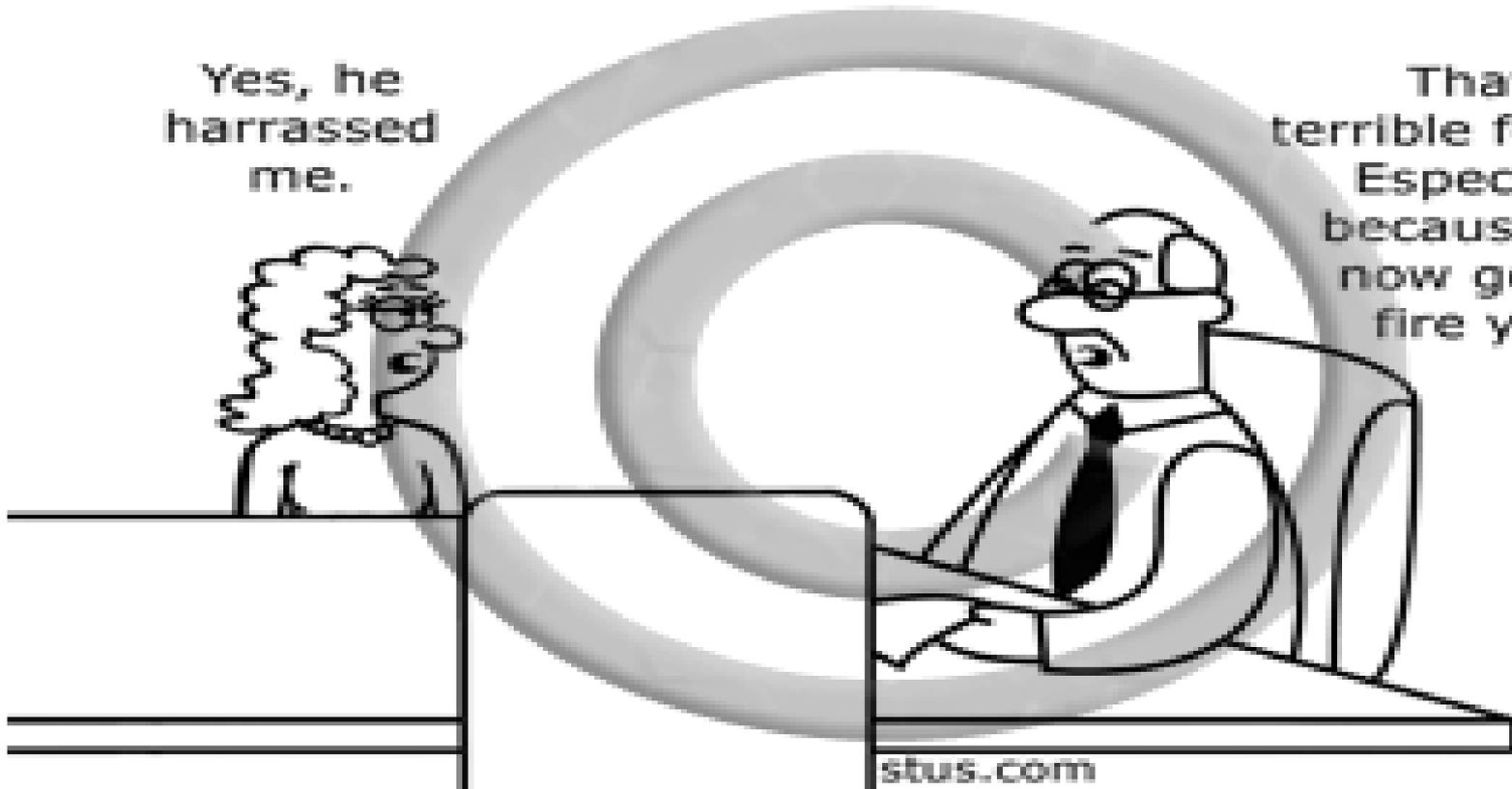
RETALIATION



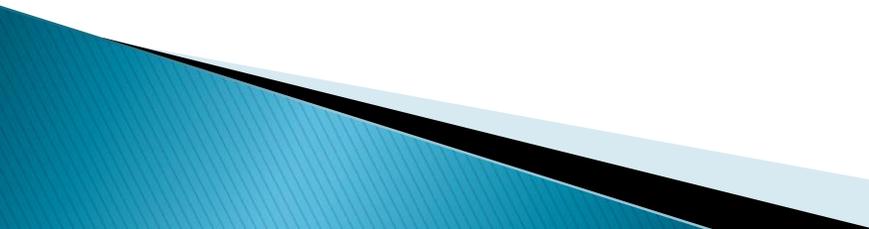
RETALIATION

Yes, he
harrassed
me.

That's
terrible for you.
Especially
because I'm
now gonna
fire you.



RETALIATION

- ▶ **Comments on Retaliation**
 - ▶ **Statistics from EEOC on Retaliation Charges**
 - ▶ **Statutes Falling under the Anti-retaliation Provisions**
 - ▶ **How to Prove Retaliation**
 - ▶ **Factual Discussion of Actual Cases Alleging Retaliation and the Outcomes; and**
 - ▶ **Best Practices for Employers**
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RETALIATION

“Plainly, effective enforcement [of the anti-discrimination provisions can] thus only be expected if employees [feel] free to approach officials with their grievances.”

Supreme Court Justice Harlan, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292(1960).

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The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.

Justice Powell, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–801 (1973)

RETALIATION

The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

Justice Breyer, *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

RETALIATION

The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status.

The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

Justice Breyer *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

RETALIATION

“The documented indications [are] that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”

Supreme Court Justice Souter, *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, Tenn., 555 U.S. 271, 279 (2009)

FISCAL YEAR 2014

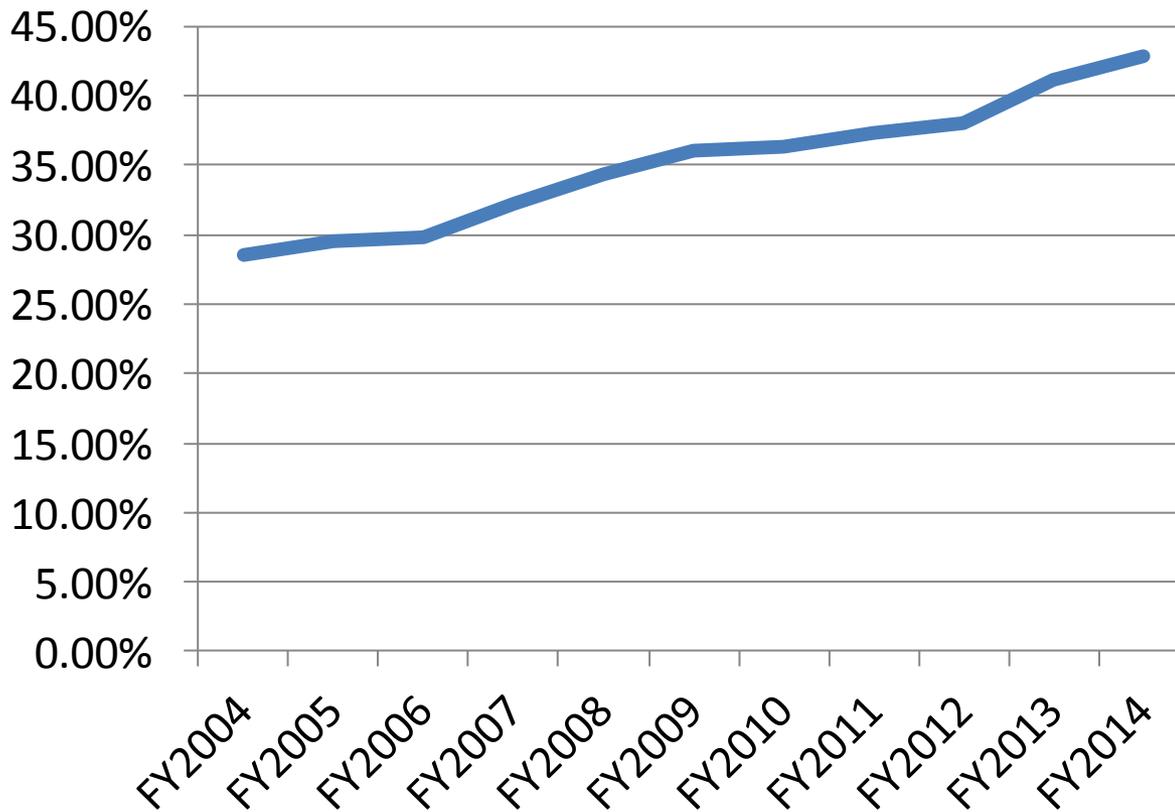
- ▶ Retaliation was the number one basis for filing a charge of discrimination.
 - ▶ Retaliation under all statutes (37,955 or 42.8%) again surpassed race (31,073 or 35.0%) as the most frequently filed charge.
 - ▶ This is the largest number of retaliation charges ever filed.
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Retaliation Charges by State

- ▶ Tennessee – 39.8% (1,283 retaliation charges / 3,221 total charges)
- ▶ Mississippi – 34.2% (609 retaliation charges / 1,781 total charges)
- ▶ Arkansas – 33.2% (445 retaliation charges / 1,339 total charges)

EEOC Statistics

Retaliation All Statutes - EEOC



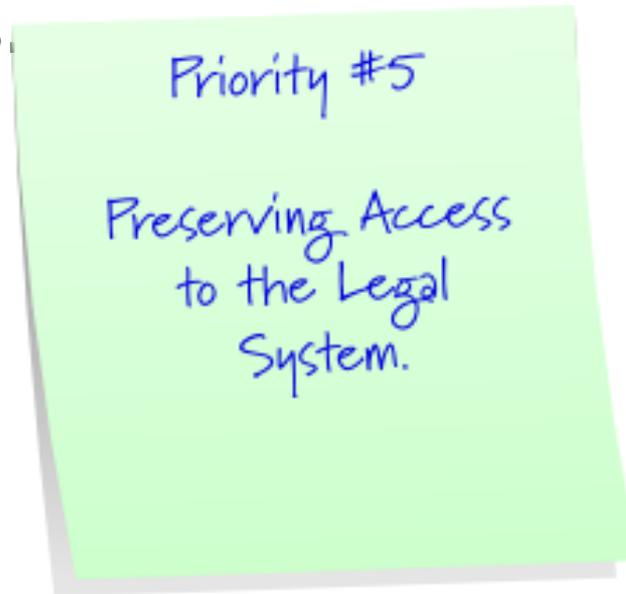
**\$140.5
million**

**Recovered in FY14
for victims of
Retaliation**

— Retaliation All Statutes -
EEOC

EEOC's Strategic Enforcement Plan

- ▶ Identifies six national enforcement and litigation priorities.



EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes.....

EEOC Anti-Retaliation Provisions

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act of 1990, as amended
- Age Discrimination in Employment Act of 1967
- Equal Pay Act of 1963
- Genetic Information Nondiscrimination Act of 2008

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All four statutes prohibit retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity.

Protected activity consists of the following:

- (1) opposing a practice made unlawful by one of the employment discrimination statutes (the "opposition" clause); or
- (2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute (the "participation" clause).

PROVING RETALIATION

A valid retaliation claim must have:

- ▶ **A. Protected activity (employee opposed discrimination or participated in a covered proceeding)**
 - ▶ **B. Adverse action (any action taken to keep a reasonable person from opposing a discriminatory practice or from participating in an employment proceeding)**
 - ▶ **C. Causal connection between the protected activity and the adverse action**
- 

Examples of Retaliatory Actions

- ▶ Discharge, discipline, demotion, reassignment
 - ▶ Harassment and intimidation
 - ▶ Denial of employment benefits
 - ▶ Unjustified evaluations and reports
 - ▶ Acceleration of disciplinary actions
 - ▶ Negative reference of former employee
 - ▶ Unwarranted contesting of unemployment claims
 - ▶ Denial of right to oppose discrimination or participate in EEO process
 - ▶ Any other action likely to deter a reasonable person from pursuing their rights.
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SUPREME COURT'S MOST RECENT DECISION ON RETALIATION

University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), held:

- ▶ a Title VII retaliation claimant “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.”
- ▶ This means that the claimant must show that the employer would not have taken the action “in the absence of” the claimant’s protected activity.

SENDING EMAILS TO PERSONAL YAHOO ACCOUNT

FACTS:

Plaintiff worked for the CEO and CFO of defendant's medical facility. Defendant fired the CFO and he sued for discrimination. Shortly thereafter, the CEO emailed plaintiff and instructed her to delete all of the emails. Believing the CEO was destroying evidence, plaintiff forwarded all emails to her personal Yahoo account. (many of these emails, unknown to plaintiff, contained confidential patient information.) Defendant's policy prohibited the misuse or disclosure of patient information and warned employees that violations could lead to termination. Later after Defendant's IT administrator discovered her conduct, the CEO ordered plaintiff to erase the emails from her personal account. Plaintiff refused and was fired. She then sued, claiming retaliation for participating in the CFO's lawsuit.

SENDING EMAILS TO PERSONAL YAHOO ACCOUNT

QUESTION:

Has plaintiff **participated** in the CFO's lawsuit when she forwarded the emails?

Has plaintiff **opposed** discriminatory action?

SENDING EMAILS TO PERSONAL YAHOO ACCOUNT

Aldrich v. RHSC, 579 Fed. Appx. 335 (6th Cir. 2014):

- ▶ No.
- ▶ Plaintiff was not directly involved in any litigation or responding to any request from the attorneys when plaintiff forwarded the emails to her Yahoo account.
- ▶ Had she been fired for disclosing the emails in response to a subpoena or for her deposition testimony in the CFO's litigation, her conduct would have been protected.

SENDING EMAILS TO PERSONAL YAHOO ACCOUNT

Aldrich v. RHSC, 579 Fed. Appx. 335 (6th Cir. 2014):

- ▶ To qualify as protected activity under the opposition clause, an employee's use of confidential documents must be reasonable under the circumstance.
- ▶ Plaintiff sent confidential records from RHSC's secured servers to her personal Yahoo account and placed at risk, the privacy of patients.

SENDING EMAILS TO PERSONAL YAHOO ACCOUNT

***Aldrich v. RHSC*, 579 Fed. Appx. 335 (6th Cir. 2014):**

- ▶ **Content of emails was highly sensitive and many were unrelated to the CFO's lawsuit.**
- ▶ **RHSC policy violated (prohibited the misuse of patient and employee information).**
- ▶ **Plaintiff's use of the emails containing confidential patient information was patently unreasonable.**
- ▶ **A reasonable jury could not find plaintiff engaged in a protected activity.**

CAUSAL CONNECTION: TERMINATED QUICKLY AFTER PROTECTED ACTIVITY

FACTS:

Employer placed plaintiff on a PIP, counseled and issued her a development plan, and gave her a final warning. Then, plaintiff reported a complaint of sexual harassment against her supervisor to HR. The HR rep contacted plaintiff almost immediately. The next day, plaintiff's supervisor called her and told her to resign or she would be fired. Plaintiff resigned and claimed, among other things, retaliation. The only evidence plaintiff presented in support of her retaliation claim was the timing of her termination in relation to her internal harassment complaint. Defendant claimed the supervisor took the action based on plaintiff's performance history. Plaintiff sued for retaliation for and lost. Plaintiff appealed.

CAUSAL CONNECTION: TERMINATED QUICKLY AFTER PROTECTED ACTIVITY

ISSUE:

Should the court allow plaintiff to proceed to trial on her claim for retaliation?

CAUSAL CONNECTION: TERMINATED QUICKLY AFTER PROTECTED ACTIVITY

Montell v. Diversified Clinical Services, – F.3d –
–, 2014 WL 2898525 (6th Cir. June 27, 2014)

- ▶ Yes.
- ▶ “Temporal proximity alone can be enough” to establish retaliation.
- ▶ (“[A]n employee who knows that he or she is about to be fired for poor performance, [t]o forestall that lawful action, ... might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.”)

CAUSAL CONNECTION: TERMINATED QUICKLY AFTER PROTECTED ACTIVITY

Montell v. Diversified Clinical Services, (6th Cir. 2014)

- ▶ Employers need not suspend previously planned action upon discovering that employee has filed a Title VII suit.
- ▶ Employees who are about to be fired should not abuse the civil-rights protections by filing frivolous harassment complaints.
- ▶ It cannot be open season for supervisors to sexually harass poorly performing employees. Such employees must still be provided with their legal protections.

ADVERSE EMPLOYMENT ACTION FOR RETALIATION CASES, LOW STANDARD

FACTS:

Plaintiff, a public safety officer for 23 years, filed two EEOC complaints and internal complaints with HR. Following these complaints, plaintiff alleges defendant subjected him to retaliatory actions, forced him to resign, and subjected him to an adverse employment action. Plaintiff sued, claiming, among other things, retaliation. After the trial court dismissed his case, plaintiff appealed to the Sixth Circuit Court of Appeals.



ADVERSE EMPLOYMENT ACTION FOR RETALIATION CASES, LOW STANDARD

ISSUE:

Does plaintiff state a claim for retaliation?

ADVERSE EMPLOYMENT ACTION FOR RETALIATION CASES, LOW STANDARD

***Laster v. City of Kalamazoo*, 746 F.3d 714, 726
(6th Cir. 2014)**

- ▶ Yes.
- ▶ Plaintiff's burden of establishing a materially adverse employment action is "less onerous in the retaliation context than in the anti-discrimination context."
- ▶ "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

ADVERSE EMPLOYMENT ACTION FOR RETALIATION CASES, LOW STANDARD

***Laster v. City of Kalamazoo*, 746 F.3d 714, 726
(6th Cir. 2014)**

Plaintiff has presented evidence showing, among other things, that after filing a complaint with HR regarding alleged race discrimination, defendant:

- ▶ denied him training opportunities and privileges
- ▶ singled him out for violating at least two department policies that were selectively enforced against him, and
- ▶ disciplined him more harshly than his peers for identical violations.

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FACTS:

Plaintiff, an English professor, sued a state university and faculty members. She claimed, among other things, retaliation, after she weighed in on the potential misuse of funds for a trip by certain faculty members and filed a charge of discrimination. Plaintiff alleged the university retaliated against her by sending her an email after she changed a web page, by denying recognition for her accomplishments, and publicly humiliating her in front of other faculty. Plaintiff claimed these were all materially adverse actions.

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ISSUE: **Whether plaintiff stated a claim for retaliation?**

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McQuail v. Tennessee Technological University,
F.Supp.3d, 2014 WL 6471416 (M.D. Tenn.)

- ▶ No.
- ▶ Plaintiff engaged in protected activity when she filed the charge of discrimination and the lawsuit.
- ▶ TTU also knew about her protected activity.
- ▶ Plaintiff, however, was not subjected to a materially adverse action because of her protected activity.
- ▶ Petty slights, minor annoyances and simple lack of good manners are not within the purview...of anti-retaliation provisions.

BREACH OF EEOC'S MEDIATION AGREEMENT- RETALIATION?

FACTS:

Former employee filed a charge of discrimination against KONE for wrongful discharge. The parties agree to mediate and all parties execute a mediation agreement with EEOC. The mediation agreement required KONE to recode the employee's personnel file to make her eligible for rehire in the future. Despite the mediation agreement, however, KONE listed the employee as ineligible for rehire in the company's personnel system, which resulted in KONE refusing to hire the employee. Employee allegedly denied rehire on several occasions from 2009 to 2012.

BREACH OF EEOC'S MEDIATION AGREEMENT- RETALIATION?

ISSUE:

Whether Kone's actions in breaching the mediation agreement by placing claimant on the "not eligible for rehire list, constitutes retaliation?

BREACH OF EEOC'S MEDIATION AGREEMENT- RETALIATION?

EEOC v. KONE, INC., Civil Action No. 2:14-cv-02674) (W.D.Tenn. 2014)

- ▶ EEOC filed suit on employee's behalf.
- ▶ Despite the mediation agreement, KONE listed the employee as ineligible for rehire in the company's personnel system.
- ▶ Then, KONE refused to rehire her.
- ▶ Resolved for injunction against retaliation, training, and payment of \$85,000.

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FACTS:

EEOC sued a logistics warehouse after it claimed the warehouse supervisor sexually harassed three females and then retaliated against them after they asked him to stop his harassment. Further, EEOC brought a claim on behalf of a male employee who verbally opposed the warehouse supervisor's harassment and supported the females' complaint. EEOC claimed the supervisor was involved in terminating each employee directly or indirectly. Jury returned a verdict of \$1.5 million and defendant appealed.



RETALIATION

ISSUE:

Whether defendant is entitled to a new trial because it claimed:

- ▶ Two of the women and the male did not engage in protected activity constituting opposition prior to discharge.
 - ▶ The relevant decision makers did not know of any protected activity; and
 - ▶ The protected activity was not the “but-for-cause” of the adverse employment action.
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RETALIATION

***EEOC v. New Breed Logistics*, 783 F.3d 1057
(6th Cir. 2015)**

- ▶ No.
- ▶ On an issue of first impression, the Sixth Circuit clarified the scope of protected activity under the opposition clause of Title VII's retaliation provision
- ▶ The opposition clause of Title VII has an "expansive definition" and courts should give "great deference" to the EEOC's interpretation of opposing conduct.

RETALIATION

EEOC v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)

- ▶ “[A] demand that a supervisor cease his/her harassing conduct constitutes protected activity by Title VII.”
- ▶ “If an employee demands that his/her supervisor stop engaging in this unlawful practice – i.e., resists or confronts the supervisor’s unlawful harassment – the opposition clause’s broad language confers protection to this conduct.”

RETALIATION

EEOC v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)

- ▶ It would be unfair to read into the provision a requirement that a complainant only engages in protected activity when s/he opposes the harassment to a particular official designated by the employer.”
- ▶ All four complainants requested that supervisor stop his harassment, and these complaints constitute protected activity.

RETALIATION

EEOC v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)

- ▶ Four complainants requesting that the supervisor stop his harassment show supervisor had knowledge and he influenced management.
- ▶ The decision makers knew the male employee was a witness.
- ▶ Jury had evidence before it sufficient to conclude that supervisor's retaliation was "but-for-cause" of the decision to take adverse action.

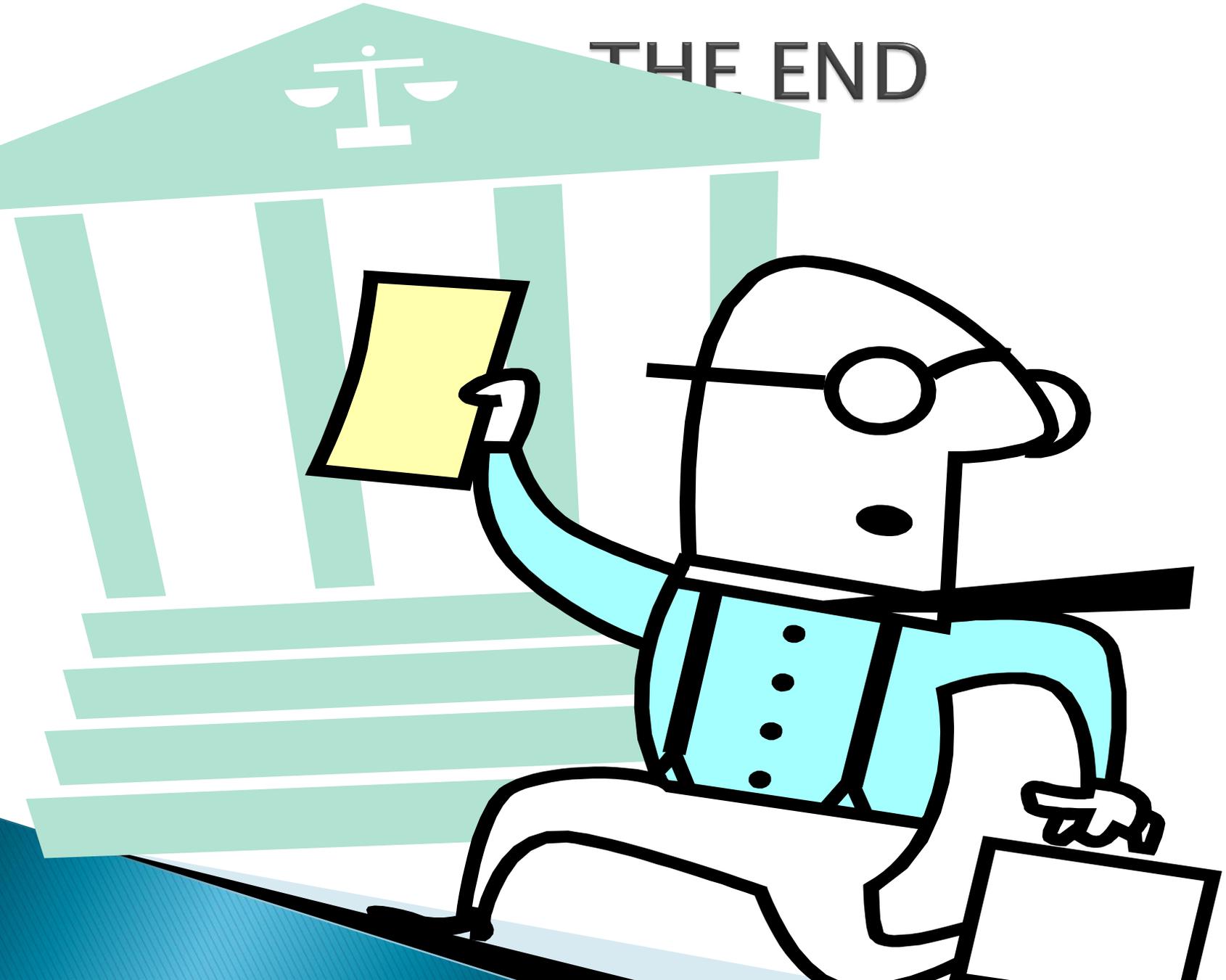
Employer Best Practices

- ▶ **Effective anti-retaliation policy.**
- ▶ **Train all of your Managers and Supervisors on the non-retaliation provisions of the law.**
- ▶ **Zero tolerance for retaliatory behavior.**
- ▶ **Communicate to employees that they are free to report discrimination**
- ▶ **Take all complaints of discrimination seriously.**
- ▶ **Investigate allegations promptly and timely.**
- ▶ **Follow up with employees who have used the complaint process.**
- ▶ **Require that supervisors report to management employees' complaints made to supervisors about their own conduct.**

RETALIATION

- ▶ www.eeoc.gov contains:
Fact Sheet About Retaliation
Fact Sheet About Retaliation/Reprisal

THE END



Contact Information

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