



# NEWSLETTERS

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## THE PASCHOS LAW UPDATE NEWSLETTER

### August, 2013

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## **BEST STRATEGIES IN DEFENDING EMPLOYMENT RETALIATION CLAIMS IN PENNSYLVANIA BROUGHT PURSUANT TO THE PENNSYLVANIA HUMAN RELATIONS ACT**

Under Pennsylvania law, retaliation is any negative employment action taken by an employer against an employee who has objected to discriminatory practices in the workplace, has filed a complaint with the Pennsylvania Human Resources Commission (PHRC) or the Equal Employment Opportunity Commission ("EEOC"), or assisted in some way with a PHRC or EEOC investigation. Retaliation claims often allege that the employer only took action against the employee because he/she filed an action with the PHRC or EEOC.

Pennsylvania's statutory laws aimed at preventing retaliation for filing a charge of discrimination are found in the Pennsylvania Human Relations Act (PHRA).<sup>1</sup> The practices forbidden by the PHRA include the firing of or refusal to hire an individual based on race, color, religion, sex, national origin or non-job related disability. Discrimination with respect to compensation, terms, or conditions of employment is also unlawful.<sup>2</sup>

The PHRA generally is in accordance with Title VII.<sup>3</sup> However, the PHRA contemplates liability that extends beyond the scope of Title VII. For example, the PHRA forbids "any person, employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice."<sup>4</sup>

The Pennsylvania Human Relations Act (PHRA) makes it an "unlawful discriminatory practice" to discriminate against an employee in any way because she "opposed any practice forbidden" by the PHRA or because she "made a charge, testified or assisted" in any proceeding under the Act.<sup>5</sup> Retaliation against any person complaining of discrimination or assisting with the investigation of such complaints is not permitted under Pennsylvania law.<sup>6</sup> Additionally, retaliation is illegal under Pennsylvania's Equal Pay Law (EPL).<sup>7</sup>

To establish that a discharge was retaliatory, a plaintiff must show that (1) he/she engaged in a protected activity; (2) he/she was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge.<sup>8</sup>

Protected activity, upon which a plaintiff may base a claim of retaliation, includes opposition to a practice made unlawful by the PHRC or participation in a PHRC investigation, proceeding or hearing by making a charge, testifying or otherwise assisting.<sup>9</sup> The lodging of generalized complaints, absent any mention of discrimination of any kind, falls well outside the scope of protected activity under the PHRA.<sup>10</sup>

The requisite causal connection element of a PHRA retaliation claim can be shown using evidence such as: proximity between engaging in the protected activity and the adverse

employment action; a pattern of antagonistic or retaliatory behavior by the employer; inconsistent employer reasons for the adverse employment action; the employer's behavior toward others; the employer's refusal to provide a reference; or a change in the employer's demeanor. <sup>11</sup>

#### Defenses

Courts often find retaliation claims are stronger than the original claim upon which they are based. <sup>12</sup> However, there are several available to an employer in defending retaliation claims. Plaintiff's failure to satisfy administrative prerequisites is one defense. Plaintiff's claim may be dismissed for failure to file the underlying charge of discrimination or harassment that includes a claim of retaliation within the appropriate 180 day time period to bring a claim under the PHRA. <sup>13</sup> In addition, assuming that a right-to-sue notice was issued by the PHRC, failure to file a lawsuit within two years of receipt of the right-to-sue notice will result in dismissal of the claim. <sup>14</sup>

The employer may also defend the action by showing there was no actionable retaliation. The employer may be able to prove the events complained of did not occur, the plaintiff did not engage in protected activity or there was no "material harm" to the plaintiff. The employer may also defend by showing there was no causal connection. The lack of causal connection can be shown by establishing that the person charged with the retaliation had no knowledge that the plaintiff had engaged in protected activity or that the time period between the protected activity and the alleged retaliation was too long. "The absence of any evidence indicating that a decision-maker working for the employer had knowledge of a plaintiff's protected activity may provide a basis to conclude that no causal link exists." <sup>15</sup>

All employers should know what constitutes a "protected activity" and exercise caution with employees who engage in a "protected activity." And, employers should know what constitutes an "adverse action" and document the non-retaliatory reasons for an "adverse action." Employers should be cautious when dealing with employees who have filed charges or complaints against the company. Employers should take care when handling any and all disciplinary actions involving an employee who has already filed a Complaint. Finally, the employer and employee must fall within the definitions of covered employer and employee for the claim to survive. The PHRA covers employers who have four or more employees, including government agencies, charities, and religious organizations. <sup>16</sup> The PHRA does not cover agricultural or domestic workers, workers who live in the personal residence of their employer as part of their job, or individuals employed by family members. All other employees are covered; however, the PHRA only covers employees who reside or work in Pennsylvania. <sup>17</sup>

#### **Damages**

By its terms, the Pennsylvania Human Relations Act (PHRA) authorizes significantly broader relief for victims of discrimination than does Title VII or the Rehabilitation Act of 1973. <sup>18</sup> In addition to permitting "affirmative action" such as reinstatement and back pay, the PHRA empowers a court to award any other legal or equitable relief that the court deems appropriate. <sup>19</sup> Legal or equitable relief includes damages for humiliation and mental anguish. <sup>20</sup>

Punitive damages are not recoverable under the PHRA. <sup>21</sup> Under the PHRA, a court has discretion to award attorney fees to the prevailing party. <sup>22</sup> Specifically, the PHRA provides:

(c.2) If, after a trial held pursuant to subsection (c), the court of common pleas finds that a defendant engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the court may award attorney fees and costs to the prevailing plaintiff.

(c.3) If, after a trial held pursuant to subsection (c), the court of common pleas finds that a

defendant has not engaged in or is not engaging in any unlawful discriminatory practice as defined in this act, the court may award attorney fees and costs to the prevailing defendant if the defendant proves that the complaint was brought in bad faith.<sup>23</sup>

The Pennsylvania Supreme Court held that, although a trial court may award attorney fees in cases where the complainant has been successful in alleging a violation of the PHRA, it is not required to do so.<sup>24</sup> The award is at the discretion of the court. However, in making the determination as to whether or not to award attorneys' fees and costs, the court may not take into account the substantial expenditure of financial resources made in the unsuccessful defense against the PHRA claim.<sup>25</sup>

The PHRA does not contain a damages cap.<sup>26</sup>

1. 43 P.S. § 951, et seq.↔

2. 43 Pa. Cons. Stat. Ann. § 955 (West 2009).↔

3. Davis v. Sheraton Society Hill, 907 F. Supp. 896, 899 n.1 (E.D. Pa. 1995).↔

4. 43 P.S. § 955(e)↔

5. 43 P.S. § 955 (West 2009).↔

6. 201 Pa. Code § 203 (2010).↔

7. Id. at § 336.8.↔

8. Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3rd Cir. 1993). A recent United States Supreme Court decision, University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), made it tougher for an employee to prove retaliation. The Court held that to establish a Title VII retaliation claim, an employee must prove that the alleged protected activity was a "but for" cause of the employer's alleged adverse action. With this decision, the Court rejected the lower standard of proof used in Title VII discrimination claims, which requires proof only that the retaliation was a "motivating factor" in the employer's action.↔

9. Mroczek v. Bethlehem Steel Corp., 126 F.Supp. 2d 379 (E.D. Pa. 2001).↔

10. Klimczak v. Shoe Show Companies. 420 F.Supp. 2d 376, 388 (M.D. Pa. 2005).↔

11. 1 Summ. Pa. Jur. 2d Torts § 12:86 (2009).↔

12. Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183 (3d. Cir. (Pa.) 2003)↔

13. 43 P.S. § 959(h)↔

14. 43 P.S. § 962(c)(2)↔

15. Klimczak v. Shoe Show Companies. 420 F.Supp. 2d 376, 388 (M.D. Pa. 2005).↔

16. 43 P.S. § 954(b)↔

17. Blackman v. Lincoln Nat'l Corp., 2012 U.S. Dist. LEXIS 175021 (E.D. Pa. 2012).↔

18. Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990).↔

19. Id.; 43 P.S. § 962(b).↔

20. Pennsylvania Human Relations Commission v. Zamantakis, 478 Pa. 454, 387 A.2d 70 (1978).↔

21. Hoy v. Angelone, 554 Pa. 139, 720 A.2d 745(1998).↔

22. Freedman v. Tozzoli, 2005 Pa. Dist. & Cnty. Dec. LEXIS 59 (Pa. County Ct. 2005)↔

23. 43 P.S. § 962(c)(4)(c.2) and (c.3)(emphasis added).↔

24. Hoy, supra.↔

25. Id.↔

26. Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570 (3d Cir. 2002)↔

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