

Employee Retaliation



But for?

- First Amendment
- Title VII
- Whistleblower
- Wrongful termination



New Jersey highest median pay of over \$90K

- Patterson \$300K Lt. IA failed inv his complaints of discrimination
- Cape May Chief \$800K
- West Wildwood Chief \$1.1m for 'Mayor meddling'



LLRMI survey 2018

- 419 responses
 - 37.2% more costly than citizen lawsuits
 - 21.1% about the same
 - 40.8% less costly than citizen lawsuits

When more costly

- 32.4% were 2X more
- 16.2% were 4X more



ISP whistleblower Brandon Eller during the first day of trial Aug. 14 at the Ada County Courthouse in Boise. Eller claims the Idaho State Police retaliated against him after he raised concerns about the investigation of a fatal crash involving an Idaho sheriff's deputy. **Kyle Green** kgreen@idahostatesman.com

[IDAHO](#)

Jury finds Idaho State Police retaliated against crash investigator, awards him \$1.5M

Mocksville NC

5,000 pop.

- Used unlisted cell to report agency misconduct to SBI
- Didn't answer SBI callback as didn't trust agent, then fired
- HB 37 would allow police officers to sue for damages over violations of the new law, which says law enforcement agencies can't discharge or threaten an officer who reports or is about to report internal wrongdoing. Officers would be required to put those reports in writing. The law would make it a misdemeanor to falsify the reports.



University of Oregon

Police Chief Carolyn McDermid was found liable in a three-week whistleblower trial brought by a former officer she hounded out of the job and got black-listed from law enforcement. A federal jury said her drive to punish him for speaking up about department wrongdoing violated the First Amendment. *The University of Oregon*

Hollywood FL 2016

- Detective in SVU gets \$115K whistleblower
- Moved her unit to open bay against her protests regarding victim privacy
- After her complaint to union, “ignored by bosses, prohibited from advanced training, and demoted to road patrol.”

LAPD \$3.6m

- 21 year stripped of rank and kicked out of LAX canine bomb unit after supporting female member of team harassment allegation
- Female member's settlement in millions too
- City had just paid \$3.1m to officer who had reported superior's racial epithets and possible embezzlement.

POLICE!
DON'T MOVE

1. [unclear]
2. [unclear]
3. [unclear]
4. [unclear]
5. [unclear]

~~THE~~ RATHER BE IT A
JOHN MELLENCAMP CONCERT

RAT

Retaliation is:

- An adverse action or conduct directed against an employee for engaging in a protected activity. Adverse employment action includes that which:
 - Is calculated to deter or punish an employee from engaging in a protected activity or
 - Is in response to an employee who has engaged or is engaging in a protected activity.

Title VII claims

- Engaged in protected participation under VII
- Employer was aware of this activity
- Employer took adverse action against and
- A causal connection exists between the protected activity and the adverse action...that there was a retaliatory motive in part of the adverse action.

Employer

- Employer can rebut the inference of discrimination by showing a legitimate, independent business reason for its decision
- The employee can then rebut this justification by showing it is simply a pretext for the actions
- Uses a 'reasonable employee' standard
- Complaints through the IA process qualify as protected activities under anti-discrimination law.

Timing of complaint



- What is a reasonable gap?
- Some courts say 3 months too long
- A court considering termination of a female deputy, “The three-day gap between the Plaintiff’s protected expression and the adverse action is evidence tending to show that ‘the two were not wholly unrelated.’”

It's what the jury sees in court



But the judge in the case ruled Emanuel would have to take the witness stand. The 11th-hour settlement prevented that. The mayor insisted the city settled the lawsuit not to keep him off the stand but because taking the case to trial could have been costlier. The settlement "would actually save the taxpayers money," Emanuel said when it was announced.

Chicago
narco
case

Jury \$2M former CO



- Bosses allowed inmates to routinely sexually assault her even after her complaint to warden
- State no laws broken in handling her complaints and simply part of working in a prison
- Found PTSD and mental health issues and no accommodation at new prison facility.

Reno \$1M 2018

- Federal Jury awards \$1M with potential for another \$1M to sergeant violated sick leave
- Complications with wife's childbirth and took sick leave (paid), not FML (unpaid)
- “threatening and demanding emails” to HR
- Passed over 5X promotion for “temperament”

New direction

- Garcetti v. Caballos, 126 S. Ct. 1951 (2006)
- Williams v. Riley, 481 F. Supp. 2d 582 (N.D. Miss. 2007) “This court is gravely troubled by the effect of *Garcetti*...It allows no federal protection for an employee of Mississippi who is fired for reporting a fellow government employee’s misconduct.”

Lane v Franks, 573 U.S. ____ 2014

- Community college employee discovered that State legislator was ghost employee
- Testified in deposition
- Terminated along with 20 others
- Only he was not reinstated
- Supreme Court concluded testimony 'outside his normal job duties' therefore had 1st Amendment rights.

Dahlia v Rodriguez

735 F.3d 1060 (9th Circ 2013) cert
denied

- Burbank robbery fiasco and continued use of force
- Officer talked to Lt. in charge and even COP
- Three interviews with IA
- Complaint to union
- Eventual interview with LASO investigating matter
- Constant harassment within agency.

Dahlia v. Rodriguez

689 F.3d 1094(9th Circ 2012)

- Burbank PD excessive force
- To SO/FBI, relieved from duty, fired
- Dist Ct and 9th panel upheld dismissal of case re: *Gracetti and Huppert v. City of Pittsburg* for going to FBI re: corruption
- En banc 9th Circ. 9-2 for Dahlia and SupCt denied cert.



- First Amendment protection and administrative leave pending discipline could constitute adverse employment action
- Challenge with *Garcetti*, ‘within job duties’ and public need
- “Depending on the circumstances, even minor acts of retaliation can infringe on an employee’s First Amendment rights.”

Jury awards \$2.8M to former IPRA supervisor who sued city



Lessons learned?



- When there might be retaliation
 - Does your administrative investigation concern a work-related issue absence the retaliation?
 - But for the alleged retaliation would you conduct an investigation?
 - Is the investigation focused on the elements in the alleged retaliation?
 - What have you done to ameliorate the alleged retaliation?

Green Bay 2016

- 'Frat house' on one shift with sex and race discrimination
- Chief out front in community and press
- Discipline including Lieutenant shift commander
- Chief agreed with the \$200K settlement and said it would come from the police department budget.

False reports

- A report is not made in good faith if it is based on information that:
 - Is known or is reasonably believed to be false
 - Intentionally or negligently ignores exculpatory information that could disprove the violation
 - Is made with the purpose of harassing or falsely maligning another employee, or
 - Is otherwise made for an improper purpose.

Supervisory retaliation samples

- Giving an unfair evaluation
- Subjecting employee to unjustified internal investigation
- Initiating unwarranted discipline or discipline for petty violations routinely ignored
- Imposing unfavorable assignment or shifts
- Ordering unnecessary fitness for duty evals
- Arbitrary rejection of voluntary OT.

Coworker retaliation samples

- Disrupting radio transmissions
- Defacing locker or equipment
- Backup and assistance delays
- 'Silent treatment' or other shunning
- Spreading rumors or suggestions impugning an employee's character or reputation.

What's the real cost?

- 2016 NPR Marketplace report of 4 years lawsuits in New Jersey settlement
 - Civilian lawsuits against agencies \$20m
 - Law enforcement lawsuits suing own agencies \$29m
 - Some had no civilian lawsuits, but had employee generated lawsuits.



Reasonable options

- Before initiating an IA against an employee who has filed a grievance or lawsuit
 - Check with Chief/Sheriff; HR; legal rep and insurance provider
 - Consider the timeline of IA initiation
 - Who is/are the complainants?
 - Is your IA necessary?
 - Evaluate what workplace changes you might be taking specifically with the grieving employee.

Employee Retaliation



Questions?

loureiter@gmail.com