Non-Retaliation:
The 5 Biggest Mistakes E&C Programs Make

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Retaliation: Why It’s Critical

- Retaliation is the most frequently alleged basis of discrimination since 2008 (EEOC)
- Number of discrimination findings based on a retaliation claim has outpaced other bases of discrimination (EEOC)
- Even when companies are innocent of underlying conduct, they can be found guilty of retaliation
- One of the least well-developed aspects of E&C programs
Understanding Retaliation: The Psychology

- Desire for retaliation is common, particularly if allegation threatens one’s self image
- Retaliation begins with a perceived offense -- accused truly believes they have done nothing wrong, or behavior was somehow justified
- Retaliation is a coping mechanism -- alleviating the psychological discomfort associated with perceived injustice
- Cognitive, emotional, and social processes can override “instinct” and guide behavioral choices

Understanding Retaliation: Personality Traits Associated with Retaliation

- Sense of entitlement -- experiences offenses emotionally and takes them personally
- Authoritarian -- places a high value on status in groups
  - Particularly true if WB is ‘subordinate’ status
- Introverts - more likely to ruminate over offense
  - Extraverts more likely to seek non-aggressive resolution -- attempt to salvage the relationship
Understanding Retaliation:
Retaliation is More Likely When . . .

- Individuals perceive the WB as intentionally malicious
- Accusation is very serious
- Accusation will negatively impact future work relationships
- Accused feels that he or she is being judged
- Accused believes that job, even perceived employability, is in jeopardy
- Accused feels the workplace is not fair -- they cannot depend on formal channels for fair or just treatment

The Five Biggest Mistakes

1. Retaliation is not properly defined
2. Policy/procedures are inadequate
3. Managers poorly (or not at all) prepared
4. Failure to train/educate entire employee population
5. Failure to monitor and enforce
#1: Not Properly Defining Retaliation

Which of the following could be considered retaliation?

a) Change of work assignment or schedule without demotion or loss of pay
b) Mentioning employee complaints in their personnel file
c) Coworkers expressing feelings of distrust and concern
d) Conduct by colleagues which occur off work time/premises
e) Not inviting the employee to a training program
f) Laying off a close family member (or ending a supplier contract)
g) Not hiring a prospective employee due to a complaint against prior employer

#1 Not Properly Defining Retaliation

- **“Formal”**
  - Termination, loss of promotion, less-desirable assignments, pay reduction, etc.
  - Typically committed by managers
  - Putting notice of filed complaints in personnel file
- **“Informal”**
  - Coworkers expressing feelings of distrust and concern
  - Different treatment e.g., ostracizing, shunning
  - Not part of the ‘inner circle’
#1 Not Properly Defining Retaliation

Important Cases: Burlington Northern & Santa Fe Ry. v. White

- Retaliation claims do not require an ultimate employment decision, a demotion with loss of pay, termination etc., for the act to be considered sufficiently "adverse" to prevail in a retaliation claim.
- Retaliation can include any adverse employment decision or treatment likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination.

Important Cases: United Airlines v. EEOC

- Requires the airline to revise its sexual harassment policies explicitly to include harassing conduct perpetrated through the internet or social media and affecting the work environment.
- Conduct may occur on or off duty.
#1 Not Properly Defining Retaliation

Important Cases: EEOC v. IXL Learning

- EEOC claimed retaliation after an employee (who claimed discrimination) was fired after posting a broadly negative Glassdoor review, including allegations of discrimination.
- Jury found for IXL: employee already planning to leave and had sent texts indicating motive for post was vengeful in nature.

#2 Policy/Procedures are Inadequate

- Retaliation is poorly defined.
- Be careful using “good faith:”
  - Define, e.g., “Good faith means that you believe the information is honest and accurate, even if you are later found to have been mistaken.”
  - BUT recent guidance suggests EEOC may find policies that require complaints to be made in “good faith” defective.
- Remove blanket provisions requiring employees to maintain confidentiality of their reports or their involvement in investigations.
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- Be careful using “good faith”
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Make sure policy and code of conduct match!

#2: Policy/Procedures are Inadequate: Senior Executives

- Audit/Compliance charter does not outline clear procedures for executive allegations
  - When/if individual notified if complaint is found without merit
  - When/if General Counsel is notified
  - Who makes decision on who investigates and when
  - When are other committee members notified
  - When are other board members (including Chair) notified
#3 Poorly Prepared Managers

We spend as much training time/resources dedicated to retaliation as we do:

a) Sexual Harassment

b) Discrimination

c) We do not offer specific training on retaliation

Which of the following could be considered retaliation? (Yes/No)

a) Change of work assignment without demotion or loss of pay

b) Change in work schedule without demotion or loss of pay

c) Mentioning employee complaints in their personnel file

d) Coworkers expressing feelings of distrust and concern

e) Conduct by colleagues which occur off work time/premises

f) Not inviting the employee to a training program

g) Not hiring a prospective employee because of a complaint against prior employer

How would your managers score?
#3: Poorly Prepared Managers (and Senior Leaders!)

- How to create a non-retaliatory environment
- How to factor whistle-blowing into performance management
  - How to manage poor performers who blow the whistle
- How to separate the complaint from the complainant
- Dos and don’ts when receiving an allegation from an employee
- How to communicate with/treat employees after a complaint
  - Do not “treat them the same”
- Do’s and don’ts when complaint is about *them*

#4: Failing to Train Entire Workforce

- Employees need to know their role in a non-retaliatory environment
  - Why speaking up benefits everyone
  - What is retaliation
  - How colleagues can be guilty of retaliation
- What to expect after raising a concern
- Resources for raising retaliation concerns
- Do’s and don’ts when complaint is about *them*
#5 Failing to Monitor and Enforce

- E&C should schedule periodic follow ups, e.g., 6 months, 12 months
- **KPMG non-retaliation program:**
  - Proactively monitors career paths of reporters using objective date, e.g., promotions, compensation, assignments
  - Monitors for period of at least 2 years
  - May periodically contact to assess possible subtle retaliation
- Follow up may be prioritized based on likelihood, nature of allegation, etc.

**Checklists**

**Policy/Procedures:**

- ✓ Have you broadened the definition of retaliation to include possible conduct outside of work and actions by colleagues
- ✓ If you use “good faith” have you defined it?
- ✓ Have you removed blanket confidentiality requirements?
- ✓ Does the Audit/Compliance charter outline clear procedures for executive allegations?
- ✓ Do your policies/procedures promote procedural justice? Communicated?
Checklists

Training:
- Do you have dedicated training for executives and managers?
  - Performance management
  - Dos and Don’ts for interactions with reporters
  - Responsibility for actions by reporters’ colleagues
- Do you have dedicated training for all employees?
  - What is retaliation
  - How colleagues can be guilty of retaliation

Checklists

Monitoring and Enforcement:
- Do you have a system of follow-up with reporters?
Questions Now?

Questions Later?
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