

Randy Krause

Good morning, and welcome to today's audio conference. Today's topic focuses on retaliation, in light of the new U.S. Supreme Court case that expanded the definition of adverse action, a critical key component of retaliation. Today, we want to explore the question, do you retaliate but don't know it? My name is Randy Krause, and I'm your moderator and one of your speakers today. The other speakers today are Lisa Williams and Mark Attwood. I will introduce them in a minute, after we cover a few housekeeping matters.

This 30-minute audio conference is provided to you at no cost, thanks to the national employment law firm of Jackson Lewis and Mark Attwood, a partner there. Our company, yourHRdepartment, provides the risk management and HR consulting services to you, along with your EPL insurance policy through your EPL insurance company. After the 30-minute presentation by Mark, Lisa and me, we will spend at least 15 minutes answering your questions.

We have so many callers on the phone that all lines have been muted, so if you ask us a question over the telephone, we can't hear you. We have set up an email address to send your questions. That address, if you have not already written it down, is questions@yourhrdepartment.com. We have someone who is monitoring that email address, so that your questions will be printed off and delivered to us. I want to assure you though, that your name will remain anonymous. We're not going to announce your name or company name when you send us a question. We're just going to focus on the facts of the question, and try to give you the best answer we can.

Mark Attwood's on the phone. Hello, Mark?

Mark Attwood

Yes. Good morning.

Randy Krause

Mark is the managing partner for litigation in the Los Angeles office of Jackson Lewis. He's a graduate of the University of Utah College of Business and College of Law. He was a William H. Leary scholar and editor-in-chief of the Journal of Contemporary Law. Mr. Attwood practices employment law, litigation, and defends all varieties of wrongful termination and discrimination claims. Mr. Attwood is a member of the California State Bar, and is admitted to all California courts.

Lisa Williams, sitting here with me, has over 17 years of human resource experience in a variety of industries including hospitality, health care, and manufacturing. She is an HR generalist with extensive experience in employee and labor relations, and worked in a union setting for nearly half of her career. Lisa graduated from UC Davis, and is a certified SPHR, that's senior professional in human resources, and certified human resource executive by the American Hotel and Lodging Association.

Finally, my name's Randy Krause. I graduated from the University of California, Hastings College of Law in 1987. I'm admitted to the State Bar of California and the Michigan Bar. I have practiced employment law since 1987, representing employers in state and federal courts. Since 1999, I've been the president of yourHRdepartment. As you know, we provide HR consulting and risk management to employers in all 50 states.

With that introduction, let's get started. Mark, retaliation is one of the fastest growing types of claims handled by the EEOC. In fact, last year there were more than 20,000 charges filed against employers with the EEOC. Tell us a little bit about your experience. How prevalent are retaliation claims? Do you see the frequency of these claims growing or slowing?

Mark Attwood

Well, my experience, Randy, would mirror what you just said. Here, certainly in southern California, we see a tremendous increase in the number of retaliation claims, and I think there are a couple of reasons for that. As we talk a little bit later today, we're going to sort of talk about what the retaliation claim is, but initially, everybody should know that it's generally based on the other claims that these plaintiffs file. Here in Los Angeles, roughly one third of all new litigations that are filed in state and federal court are actually employment related, so employment litigation is certainly huge down here, and I think it is in the rest of the country.

Why are these claims so common, and why are they on the increase? I think, at least from my viewpoint, they're easy to allege. They go hand-in-hand with a harassment or wage claim, where the employee's complained about something, and in my experience, what you'd have also happen is that the employees who sue are usually in some sort of disciplinary trouble at work, so it's very easy for them to characterize any action that the employer takes against them as retaliation. I think for those reasons, and there's one other chief reason too, the retaliation claim can survive, even if the underlying claims, the race, wage, or discrimination claim, be that what they may, are kicked out, the retaliation claim can still survive and go to trial, so they're attractive to plaintiff's counsel.

Randy Krause

So what you're saying is that we could have a situation where an employee claims that she was sexually harassed, and she may file a lawsuit, the company could respond to that claim appropriately, and so on, but she could claim that after she complained about sexual harassment, she had been treated differently in her workplace, at which time she would add retaliation to that lawsuit, and the employer can hire a lawyer like you to defend them, and may actually win the underlying case of sexual harassment, and demonstrate that, "No, no sexual harassment actually occurred here at all." It could have even been fabricated, but she could still win on retaliation if, in fact, the employer treated her differently or inappropriately after her complaint. Is that what you're saying?

Mark Attwood

That's exactly what I'm saying. That's not an uncommon scenario, and as we talk a little bit later today, we'll see where the employer takes what it thinks is seemingly an innocent or business related action, and it's characterized as retaliation.

Randy Krause

One of the problems that we see when we help employers all across the United States dealing with these sorts of claims is that once somebody makes some sort of complaint, especially if the employer in their heart of hearts does not think that there is a real basis for that complaint, if they think it's just kind of frivolous or maybe not even true, human nature inserts itself here, and the employer just naturally tends to not like the complaining employee as much, and tends to want to treat them differently. That is one of the problems that we see here that leads to retaliation. Is that something that you see as well?

Mark Attwood

It is. As I said, it's very common, and unfortunately, and we'll talk about this again in a minute, there are so many bases for which an employee can claim that employers really have to be on their game in terms of really listening to what the employee's saying.

Randy Krause

Okay. So let's go over the basic elements of the retaliation claim. The employee who complains and files a lawsuit, of course, becomes the plaintiff in that lawsuit. What does the plaintiff need to prove in order to win their case for retaliation?

Mark Attwood

Well, there are three basic elements, and again, to sort of repeat, the employee can complain on a number of what we would call statutory bases. For example, with Title 7, the discrimination laws, an employee could complain that he or she was harassed. In California, we have an actual whistle blower statute under our labor code. The labor code in California, for example, has 9,000 provisions in it, so there's a statutory basis for which an employee could claim some sort of right.

There's also a common law retaliation basis where you have your typical wrongful termination in violation of public policy. Those are sort of the two things that make up the first element, and there are three elements of a retaliation claim. The first is what's called a protected activity, and that, in simpler terms, is anything the employee has a right to do by law. For example, that could be an issue of wages, a workers' compensation complaint, discrimination or harassment, an issue about not getting a lunch break or a rest period, those types of things. It's where the employee has a certain right, and they're either talking about or exercising that right in the workplace.

The second element is what's called an adverse action. After the employee has engaged in the first element of a protected activity, there must be an adverse action, and that is any sort of action by the employer that would be likely to deter an employee from complaining, either internally to the employer, externally to an administrative agency, a court, or something along those lines. We'll talk a little bit further about what exactly the standard is for determining the adverse action.

Again, the first element is: engaged in a protected activity, the second element is: adverse action, and then the third element is what's called a causal link between the protected activity and the adverse action. Again, another fancy way of saying that there must be a cause and effect, which the adverse action must be related to the complainer of the protected activity, and there, Randy, the key thing is that the employer must have actual knowledge of the protected activity, but that often times is not too hard to prove. In terms of litigation, the causal link is where the battleground is fought. That's where the employer has to say, "No, we didn't terminate the employee," or, "We didn't change their schedule, or discipline them because of their complaint." It was rather for some other legitimate business reason.

To summarize, the three elements are protected activity, adverse action, and a causal link between the two.

Randy Krause

I will add on that; you raise a point about the employer having knowledge of the protected activity. Something that not everybody understands fully, and that not everyone knows, is that their managers and supervisors stand in the shoes of the company owners. They are the eyes and ears of the company, and what an employee may tell a manager, the company is deemed to know, so whether or not the owner of that company actually had a conversation with that manager where this issue came up, if that manager stays quiet, the company owner is going to be deemed to know that information. This is why we preach so hard about managers reporting issues to upper management, so that, if you're going to make a decision to ignore something, at least a conscious decision, you know what's going on, and you're making a business choice of how to deal with it.

Okay, let's start to unpack this a little bit. Let's start with the top one, protected activity. If you're taking notes, put protected activity at the top of your page, because we've got a few things to add to that, so, what is protected activity? Well, as Mark said, it's anything that the employee has the right to do under the law. That includes harassment or discrimination complaints, requesting FMLA leave, filing for workers' comp benefits, reporting a corporate wrongdoing, supporting a labor union, complaining about wages or working conditions, and so on. All of those things an employee has a right to do under the law, but Mark, what are some more examples?

Mark Attwood

There are many, Randy. Employees could complain, for example, about safety issues at work, and OSHA, I'm sure everybody in the audience is aware, is a big body of law. An employee could ask for some type of reasonable accommodation. For example, they may need an ergonomic chair to help their back during the day, or an ergonomic keyboard, and they may make a request for that. An employee may make some sort of request for some time off that might fall under one of the many provisions, at least state law provisions. It may be time off for voting, a law we have here in California, or jury duty. There's just a whole host of things that employees have rights to do in the workplace, so again, I have to reiterate, this is where it's so important for HR, and frankly, the supervisors who supervise employees to be very cognizant of these type of complaints, or maybe what's even just an innocuous question which is, "You know, my wrists are kind of sore, here. Is there anything we can do about that for my typing?"

Lisa Williams

Mark, I want to just highlight the last point that you made, and I think it's an important one for employers to really understand. The employee doesn't need to make an actual complaint in order to have engaged in some protected activity. To highlight the example you just gave of a person saying, "Hey, my wrists are kind of sore," that could be viewed as a complaint, if adverse action was taken, the complaint moved forward, and the employee actually alleged they were retaliated on that basis. I think it's those kinds of sneak attack comments that keep employers off guard, and one that they really need to pay attention to.

Randy Krause

Yes. This comes up all the time in ways that employers never could anticipate. For example, in many states, and maybe even most states, did you know that an employee has the right to time off of work, sometimes even without notice to the employer? Some examples of that are: time off of work to go to court to deal with a domestic type of dispute, or maybe seek a protective order to keep their ex spouse away from their children. This comes up more than you might think. If that person was missing from work, and you terminated or disciplined them, they, actually by taking that time off, engaged in protected activity, and you need to watch yourself. You know, nobody can keep track of all of these exceptions. We have a document on our Internet system that all of you on the phone have access to. We call it red flags before taking adverse action. If you want a copy of that, send an email requesting that to the email address that we provided to you earlier. That is a checklist of all of these things that would take you by surprise if you didn't know them.

Okay, moving on. Last year, the U.S. Supreme Court broadened the definition of adverse action. Now, in that case, let me give you a little bit of background of that case, because it might surprise you. In that case, we had the plaintiff, last name White. Ms. White is hired by Burlington Northern, a railroad, for what is not a very nice job; she's hired in the clean-up crew. She's one of many who go out around the tracks and facilities, and they're picking up junk and

cleaning things up. She's working there for a few months, kind of gets the lay of the land, and sees some forklifts that people are operating. In her opinion, that job sure looks like it's a lot easier than bending over and using her hands, so she hops on the forklift and starts being a forklift operator. After weeks and months of this, she kind of becomes the de facto forklift operator; every morning, she's driving the forklift.

Well, some time into it, she makes an internal complaint about sex discrimination, and says that her supervisor made some insulting and inappropriate remarks to her. Burlington Northern did what they were supposed to do; they conducted an internal investigation, and found that there may have been something to her allegation. They suspended the supervisor who made those remarks for ten days, but, at the same time, they told Ms. White, "Listen, you're driving the forklift, and we think you ought to be picking up the trash with your hands." Her pay didn't change, benefits stayed the same...nothing changed, and the company argued that, "Hey, she was just moved back to doing what she did on her first day of employment. She was never promoted to being a forklift driver; she just did that on her own accord."

She continued to have some trouble, and a month later, she was suspended for some insubordination. She sued, and there was a decision by the U.S. Supreme Court based on these facts. Mark, why don't you explain what the U.S. Supreme Court did with these facts?

Mark Attwood

Thank you, Randy. What the U.S. Supreme Court did was try to give an even standard for what an adverse action is. It came up with a test, and what it talked about is that in order for there to be an adverse action, there needs to be some material adversity. There are sort of two elements to that. One is how do you determine what the material adversity is? Two, what's the effect of it? As we mentioned earlier, as far as the effect goes, it has to be likely to deter somebody who's complaining, or the employee who's asserting their right from complaining, again, either internally or externally. That means through the company's complaint procedure, to the EEOC, or the courts because of the action.

Again, what does that all mean? That means that according to the standard that the Supreme Court set out, which is a reasonable employee standard, it would likely have that deterrent effect. It is what I kind of call, although the Supreme Court said it's an objective standard as to what would deter a reasonable employee, frankly it's really a subjective standard because it really has to do with the facts and circumstances of each case.

Randy Krause

That's good. So in just real terms, what the Supreme Court had to look at was, "Okay, by moving Ms. White from this forklift driver position, and, so to speak, to the position she was originally hired for, did that constitute an adverse action, which is the second prong of this three-part test?" What they said was, "Well, if it would deter a reasonable employee from asserting on some other complaint of discrimination or harassment, then yes, it is an adverse action." So the question becomes, if other employees are looking at this and saying, "Gee whiz.

If I make a complaint about gender discrimination, or if I engage in any other protected activity, then they'll change me into this other job which is harder and dirtier. Maybe I'll keep my mouth shut." If that's the reaction, then it is an adverse action.

Okay. Last part of the three-part test is the causal link. So you mean, if I fired a woman the day after she tells me she's pregnant, I've got a problem?

Mark Attwood

Yes. I think that's exactly right, and one of the other aspects of the case law in this area is what's called timing (there is a fancier word for it, but we'll call it "timing"). Since the day after is so close in time to her complaint, the law will actually infer or presume that there is a link between those two actions because they're so closely related in time. The causal link, as I mentioned earlier, is really where the battleground and the litigation is fought, because once the employee gets their case to court and says, "Look. I basically can meet these three elements: the protected activity, the adverse action, and I'm alleging there's a causal link, because it was so close in time." It's up to the employer at that point to put up its evidence to say, "No, we did what we did for legitimate reasons. We changed your schedule because we had a different shift or a different business need, or we needed you to cover somebody's absence. The adverse action was a layoff; we laid off because we had a slowdown in business." This is where the battle is fought, and where it's so very important for the HR professionals on the phone to review any type of action, and make sure that the reasons why we did what we did are well thought out and well memorialized.

Randy Krause

Timing is huge. If we waited a year to terminate this person after, well I guess after she returned from her pregnancy leave, do we have a better shot?

Mark Attwood

We do have a better shot. The case law varies, at least in California, and some of the federal case law talks about maybe six or seven months being enough time between the protected activity and the adverse action to not create that type of difference; certainly 12 months would, that's for sure, but any time you get within, at least in my view, the six months, you've got a potential issue.

Randy Krause

Well, there's no magic time period; I want to emphasize that, if anyone in the audience is thinking, "Boy, I've had a problem with this person, and it's been 12 months since their workers' comp leave. Now, I can terminate them." The analysis goes far beyond just the time. Once they've complained about something, or engaged in some sort of protected activity, even though they're at will, our advice to you would be that still, you do not do a termination or any other adverse action, unless you had some pretty good reason to do it; that's just kind of

between us on the phone. It doesn't change them from not being at will anymore, in a legal sense, but from a risk management standpoint, you better have some pretty good documentation of real life problems that would justify the adverse action.

Mark Attwood

You know, Randy, following on what you said, one thing I think that the listening audience should know is that the law has held that retaliation can take the form of a series of individual acts over a period of time. Each act in and of itself may not be enough to be an adverse action, but together, they show a pattern, and create a pattern that does become an adverse action.

Randy Krause

Right, so very difficult. If you're dealing with one of these types of situations (I think everyone on the phone here has unlimited telephone support from us), give us a call, and if you need Mark's help, we will get you in touch with Mark. At this point, we're going to move into preventative measures, and before we do, we will take a very short break. It may be 15 seconds, and the callers may hear silence for a few seconds. Then, we're going to move into answering the question, "What can you do to really prevent these things?" We'll be right back.

Okay. Let's hear from Lisa. Lisa advises employers across the country on these issues, and many on the phone here today may have talked with Lisa when calling into our office.

Lisa Williams

Thanks, Randy. I want to talk a little bit about what you should do if you do receive a complaint of retaliation. I think it's important that employers think preventatively about trying to avoid retaliation claims, and really, as we've been talking, evaluate their actions. They need to take them in some close proximity when the employee has made a complaint, and that complaint doesn't need to be, "I'm complaining about harassment." It can be something as offhand as, "You're disciplining me, and I think you're picking on me." Employers may dismiss a comment like that, but I would encourage you to really explore any comments that an employee makes of that nature, because doing so helps you determine whether or not there is a complaint hidden in that offhand comment. That can help you prevent getting the surprise retaliation claim if you then make an adverse action against that person, and they later insert that they did try and make a complaint about their working conditions. So the complaint doesn't have to be verbalized as such; it can just be an offhand comment about a protected activity, or about their work and their work environment.

If the employee has made a complaint about retaliation, it's important that you investigate that. You don't want to dismiss an employee's comment of, "You're just doing this because I was pregnant and took pregnancy leave," or "because I filed for workers' compensation." You need to really carefully take a look, and investigate everything that the employee has to say. Ask them to make a statement, and document it; either have them do it, or you can document it and ask them to sign; you need an accurate representation of what you talked about. If there

are any witnesses to comment on behavior, you'll want to interview those people as well. If there has been action by a supervisor, that supervisor may need to have corrective action. There may need to be corrective action in the employee's work environment or working conditions, if the retaliation resulted in perhaps their job duties changing, or in some other factor relating to their working conditions.

You want to keep an eye on the work environment for that person who has complained, and maintain the status quo, which means, don't change anything. You want to keep their salary, location, working conditions, and their schedule the same. You also want to really make sure that you don't do anything that's going to give cause for them to say that they're being retaliated against further.

Randy Krause

What if the employee did not complain about retaliation? How do you prevent the lawsuit you can't see coming?

Lisa Williams

Well, as I mentioned, from where I sit, and from the calls that I receive, I think those are the lawsuits that are more common. I think most employers are not sitting at their desks thinking how they can retaliate against an employee, or how they can make their employees lives worse. I find most employers are truly good-hearted, truly want to do what's best for their employees, and sometimes they're just caught off guard. You need to take a look, and identify any employee who is engaged in some kind of protected activity, because those are the people who would potentially file the lawsuit. Sometimes it's pretty easy to see. Some employees seem to assert their rights very forcefully and make threats. They think, Mark, that they're lawyers like you, I think. Sometimes they say they have a right to this, and a right to that. Maybe they watch too much TV, but those are the people particularly you need be careful of, so look to anybody who's engaged in a protected activity.

You need to analyze the unique facts that surround each of these employees. You're at risk, and as Randy pointed out earlier, that means managers and supervisors, if you make any change to that employee's working conditions, again, maintain the status quo. If you need to change the status quo, you need to evaluate that change from many, many viewpoints. You need to look from your viewpoint, and look at, "Are there any ill motives?" I would highlight a possible scenario, say you're the human resource person and you tell a supervisor that you're going to have to make layoffs because the business has declined; this is logical, and it happens all the time. You ask the supervisor for recommendations as to who should be laid off. The supervisor might say, "Well, I think that Stephanie should be laid off. She wasn't the last person hired, but she's really not performing that well." You say, "Okay, 'check' to Stephanie." However, you need to really evaluate that manager's decision, and ensure that he's not making that decision based on some protected activity. Maybe Stephanie had to take time off to care for a child, or maybe Stephanie has voiced a concern that the working conditions did not seem safe. You need to really ensure that the supervisor's motives are not negative motives.

You also need to look at it from the employee's viewpoint. In making this change, how will it affect their working life? Will it affect their income, personal life, or time off? Would the affect in their life tend to discourage another employee from engaging in a protected activity, or voicing a concern or complaint? You can also look at how other employees would view the change. In the change that you're looking to make, would it discourage another employee from voicing a complaint? You also need to look at your documentation. You need to look at email and other documents that are related to the employee at issue, and see if there's anything that would suggest a causal connection between the protected activity and the adverse action.

Sometimes people send email. In today's email, it seems to have become very casual. Well, I could shoot off an email to Randy and say, "Can you believe that Manya was complaining about her chair? Does she not know that her chair is great, and that she should just be happy to have it?" That's just an innocent, offhand comment, and it could later come back to be harmful to you. Really take a look at all those emails, and ensure that there's nothing there that would damage you. I would encourage you to keep the emails. If you begin to delete emails, you're going to run into other problems because you're required to retain them, so take a look at them, collect them, and ensure there's nothing damaging.

Finally, look at the employee's personnel file, and ensure that it supports what you're trying to do. You may have reviews in the file that support your decision; there may be other discipline that supports the decision. If there's nothing in there, and you are looking to make a decision, you could run into some problems. In fact, you probably definitely would run into problems, so make sure that the documentation that you have supports the decision that you're looking to make.

Randy Krause

Great. Thanks, Lisa. Just a couple of last minute points before we move into question and answers. I encourage you, if you have anything going on in your workplace that you're concerned about, send that over to us in an email, and we'll be able to address it here. For general prevention techniques, number one: identify the people who have engaged in some protected activity. Again, our red flags list will help you do that. Now, I see that a lot of people actually have already requested that list, and I want to caution you on one thing. That list is current as of today. It does get updated frequently as courts and states around the country pass new laws or make new law, so when we update it, it gets updated on-line. What you're using today may be out of date by within 30 or 60 days. I encourage you to actually log into the on-line system in the future, and to obtain that document.

Second, review and update your retaliation policy; it might be buried in your anti-harassment and anti-discrimination policy, or it may be a stand-alone, but it should be reviewed and updated, so that you're confident that it is strong enough. We have those policies on our system as well, and would be happy to send them to you. If you want one of those, just send us an email and say, "Send retaliation policy."

Next one is training. We've tried to make training really easy. You really need to train your managers and your supervisors about your retaliation policy and about retaliation and avoidance in general. To help you with that, we send information out to all of our clients, and everyone on the phone should be receiving these. If you're not, again, please send us an email and say, "Sign me up for these"; we call them monthly manager training programs. Our monthly manager training programs are really short; they're about one page long. They're intended to use at a monthly manager meeting, not to be so long that we don't get on your agenda; maybe three or four or five minutes covering these things per month will go a long way. In January and February, both our manager training programs covered the retaliation issue, so we'd be happy to send those to you if you didn't already receive them.

Another training technique we use is short audio training. These are training programs that the managers/supervisors can download to an iPod and listen to anywhere. They can also listen to the same program at their desk with their computer and speakers. They're about five to ten minutes in length, so they're not long. We send them out every month, and in the next few months, we're going to be doing two of those trainings on retaliation. Also send us a note if you want to receive those and are not already getting them.

Number four, improve your documentation of employee problems. All of us lawyers would like, of course, for the employee's file to be filled with typewritten documents outlining in detail the employee problems, the expectations, and what's going to happen if they don't meet your expectations, signed by the employee and also the supervisor. In reality, that doesn't happen very often. If it does, we're thrilled; if it doesn't, we would much rather see a contemporaneously written document. That is, at the same time as the problem, the supervisor writing up something even on a half sheet of paper: "Had a problem with Stephanie today. This is what's going on. This is the third time I've talked to her about it." Jot down today's date, sign your name, and stick it in her personnel file. You don't have to go talk to her about it or confront her on it. It would be better if you did but, Mark and I, and a lot of other defense lawyers, would much rather have that scrap of paper in that personnel file rather than nothing.

Lastly, be brutally honest when you're doing your performance evaluations. If you do them annually, and you're ten months away from doing the next one, I hope you remember this point. One of the things we fight with all the time is performance evaluations that don't bear up to what the employer wants to say in court. Employees don't get fired because they're good employees; they get fired or demoted because they have problems, yet the vast majority of times when Mark gets a case to defend, he'll say, "Let me see the employee's personnel file and the reviews." The performance reviews do not reflect the problems that the employer is now saying exists, and that's a huge problem.

With those general prevention techniques, I want to move into question and answer, so let's go. We will start with question number one. This person says, "We are a construction firm. What if you have a workers' comp employee who comes back on restricted duty? Does their job description have to change? They aren't capable of doing what their job duty is." This construction firm is asking about a worker who's come back to work off of worker's comp on restricted duty. They say they aren't capable of doing what their job description says their job

is. What do we do? Mark, you probably have heard this problem in various ways over the years. What do you think?

Mark Attwood

You're right, Randy. It is a frequent problem, and this area, where you have either an injury or some sort of medical condition of an employee, whether it's work related or not, but especially if it's work related, raises a number of issues. The three basic issues it raises are one, the employee has exercised the workers' compensation right, so anything you do to change, to use your words earlier, the status quo, might be construed as retaliation for filing that claim, or exercising that right. Even in California we have a specific statute that deals with that discrimination. If the employer is big enough, it also potentially raises, a family leave issue because the employee may have their own serious health condition (and obviously, if they're off for an injury, they do), for any period of time.

The third thing that it raises, and probably the most prominent thing right now in this situation, is a disability issue, an ADA issue, because the question was, does the employee's job description have to change? The answer is, potentially yes, if that is what's necessary, or reasonably necessary, in the form of a reasonable accommodation. These problems are very thorny because you have three areas of the law which may not frankly be consistent with one another, but all making demands on the employer to do certain things. The best advice that I can give any HR person dealing with this type of a problem is to make sure that they are following the legal requirements in all three of those areas if they apply, and if it's really a sticky issue, to really work with your legal counsel because this is where you can really make an unwitting mistake.

Lisa Williams

I would add to what you said, Mark, in that this is the type of situation which is just, as I like to say, fraught with danger, as far as the potential for a retaliation complaint, because it can be frustrating to the supervisor to have to modify the duties. It can be frustrating to co-workers to have to maybe pick up some of the duties, or to see that the employee is not performing the same level of workload that they are. Clearly, you can't talk to other employees about the accommodation or the restrictions, so it can create friction. I think employers really need to watch those types of situations to make sure that retaliation does not happen from co-workers or from the supervisor.

Randy Krause

Good point. Next question: "A woman in our office has just asked us to advance vacation time to her. We said no. We have allowed it in certain cases in the past, but not every time. She came off of maternity leave a couple of months ago, and had used all of her vacation time for that. I am worried now because it sounds like that could be a problem. Is it?" In this case, Mark, a woman who just came off of pregnancy leave has used up all of her accrued vacation time during that leave, which is very common, and now comes in and wants an advance of

vacation time that she has not accrued, but she promises to work it off. They said no, although they've allowed it at times in the past. Do you think they have a problem?

Mark Attwood

Well, potentially they might. We'll do our analysis that we learned earlier in the program, Randy, where we ask, "All right, what's the protected activity?" In this situation, it may be the request for vacation time; it just depends. However, if we move on, we say, "Well, what's the adverse action? Is there a causal link between the two?" Again, this is where the battle is fought in litigation. With regard to the causal link, the employer would have to say something like, "We didn't grant her that time because of our scheduling (or work demands)," or, "We had to get orders out," or whatever the case may be. The problem is they've done it in the past for different people, so the analysis is going to be, what's different about this situation and the other people who got it in the past? What were the terms and conditions under what occurred there? There may be no real distinction. It may be sort of arbitrary, in which case then, it's very easy for the employee to argue in that situation that, "You didn't give it to me because I exercised my right with regard to my maternity leave. These other people were all men; I'm being discriminated against." You have to look at the whole landscape there to determine whether there's a potential issue, but the person who asked the question was right to do so because, yeah, there might be a potential problem there.

Randy Krause

Yeah, and I think the employee will certainly argue that, "My protected activity was taking my pregnancy disability leave, which I'm entitled to do under the law, and that's the only difference between me and all these other people who were granted an advance of their vacation time." Is it an adverse action? Well, if other people look at that and say, "Gee wiz, if I do what I'm entitled to do, I won't be granted some privileges and benefits that are granted to other people in this workplace." That probably is an adverse action. In my view, I would say this plaintiff has a pretty good case. I also want to add that knowing Mark, he could probably defend the employer successfully.

With that, we have another question. Okay, we have a lady who complained about sexual harassment last year. "We called your company (that's Lisa and Randy here), to get some guidance, and we did what you told us, an investigation et cetera. Now, she is complaining that some of the guys she works with. Friends of the man she complained about are rude and mean to her. Could that be retaliation? If so, what should we do about it?"

Lisa, what do you think?

Lisa Williams

Well Randy, I think, as we reviewed earlier, you're going to have to really look at that complaint, take it seriously, and do an investigation. It could be that friends of the person that she complained about are treating her differently because she made that complaint, and it's

important that you, again, take her complaint seriously, and do a thorough investigation. If you find that the co-workers are retaliating against her, you're going to need to take disciplinary action with them to ensure that the conduct stops. Then look again at her work environment, and ensure that you maintain the status quo with all of the things that are related to her. I would say that this is a very difficult area. In many environments, all the employees become friends, and if somebody treats another person poorly or discriminatorily, unfortunately people end up finding out about it. As much as you need to and try to keep it confidential, people find out because perhaps the person that's being complained about tells them. It just creates a difficult situation, so you really need to monitor workplaces carefully whenever somebody has made a complaint about harassment, even after the investigation has concluded. Then investigate anything else that comes up.

Randy Krause

This one's really for the lawyers because whether or not her co-workers are being rude and mean to her, it constitutes an adverse action...I think you're going to get sued on this one; you may win. You may prove that this is not an adverse action that the employer engaged in. To be honest with you, from what I've seen, I think you may lose to the extent that the employer had some ability to control this work environment and didn't. Mark, what are your thoughts?

Mark Attwood

Well, I think that that's right on, Randy. One thing I think will be critical in the analysis here is whether the workers that the victim of harassment is complaining about are actually supervisors or co-workers, because if they're supervisors, then you really do have a much more significant legal issue in your hands.

Randy Krause

Okay, I agree with that. Let's see. Now to the next question (and we have a couple more, so if you have a question, you have a little bit of time to send one in. Otherwise, we're going to have to finish the next couple and then conclude). Let's see... Lisa, can you handle that one?

Lisa Williams

Sure, Randy. This person writes in: "We have an employee that is on workers' compensation, and they have a scheduled route that must run daily. If this employee has been out over six weeks, would you not agree that their position must be filled? My question is: at what point would it not be considered retaliation?"

Well, there are a few areas that you need to look at in regards to this issue. The first of which (which we don't know from this e-mail) is, how many employees does this employer have? If they have more than 50 employees within a 75 mile radius, then the employee who is out would be entitled to FMLA, and the employer should have designated that they're out for workers' comp as FMLA. Under that, they can be out up to 12 weeks if medically necessary.

Even beyond the 12 weeks, it's not unlikely that the reason they're out is something that may constitute a disability, either under federal law or under state law. If the reason that they're out, again, is something that constitutes a disability, at the conclusion of 12 weeks of FMLA, and frankly even if the employee is not entitled to FMLA, the employer would need to engage in an interactive process to determine if there's a reasonable accommodation that would allow that person to continue their employment. The EEOC and courts have said that in some instances, additional leave is considered an accommodation.

Under the workers' comp law in most states (not all, but most states), employers are required to give an employee who is injured on the job time off in order to recuperate from that illness or injury, and restore them to their position at the conclusion of their leave. I know that all of this information can be frustrating for employers to allow the time off, and have them continue potentially on an unending basis, but they can fill the position temporarily with the understanding that once the employee is restored, that they will be coming back to that job.

Randy Krause

Good answer. We have one more question. Mark, do you have anything to add to that, or should we move to the next question?

Mark Attwood

Just really quickly. I mean, Lisa was right on. The only thing I would add is that often times I see that the employer thinks that replacement of the employee is really the way to go, but what the law's going to say is, "Was it really a business necessity to replace that employee? Could you have filled it with a temporary worker?" More often than not, the burden would be on the employer to fill that job temporarily, and not go for an overall replacement.

Randy Krause

This next question is very interesting. As I said earlier, we won't talk about the company or the author, but I will tell you the author's position of this question; she is the HR manager. She writes: "I have a branch manager that yells at employees for utilizing HR services..." (and I am sure she means for coming to HR for help) "...without his express permission. This happens even if the employee comes to HR on his/her own time, off from work to get information on FMLA, return to work issues, and so on. Is his yelling at the employees considered an adverse action under the Reasonable Employee Standard?"

Mark, what do you think?

Mark Attwood

Well, I think it can absolutely be considered an adverse action for the reasons that we talked about earlier, which is, it could be likely to deter the employees from going to HR, and I think that that's a very significant problem. One thing that I always tell our clients is, "Imagine telling

our story to 12 people in a jury box in downtown Los Angeles, how is that going to sound?" The fact that a supervisor is yelling at employees for going to HR I don't think is going to sound very well, so I think that this is a dramatic problem.

Randy Krause

Yeah, I agree with you. I think that when you replay that story to 12 people who don't know your workplace, one thing that jurors have in common, almost universally, is that they're all employees; they all have been employees; very few of them have been the company owner. You're talking to people who have been there, and they say, "Hey man, that would really make me angry," or, "That would really frustrate me, and that's just not right. These employees should be able to go to HR to get information on their FMLA leave or return to work (and so on)." That's true. Whether this employee is a good employee or what we might call a "whiner" and a "complainer", they still have the right to get that information; the company has made HR available for that purpose.

I don't see any other questions, so we are going to wrap up for the day. Of course, if you have questions, you can continue to use that e-mail address for the next couple of days. If something comes to mind, you can send it to us, and we will give you a call back, or return an e-mail to you. Thank you for joining us today. It was great to have all of you on the line, and Mark and Lisa are here to answer your questions. We will see you next time. Our next audio conference is scheduled for June, so you will be getting notification of that well in advance. Thank you again, and have a great day.