



# Toxic Employees: Strategies to Deal with “Pre-taliation” and Legal Protection Manipulation

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# Presented By



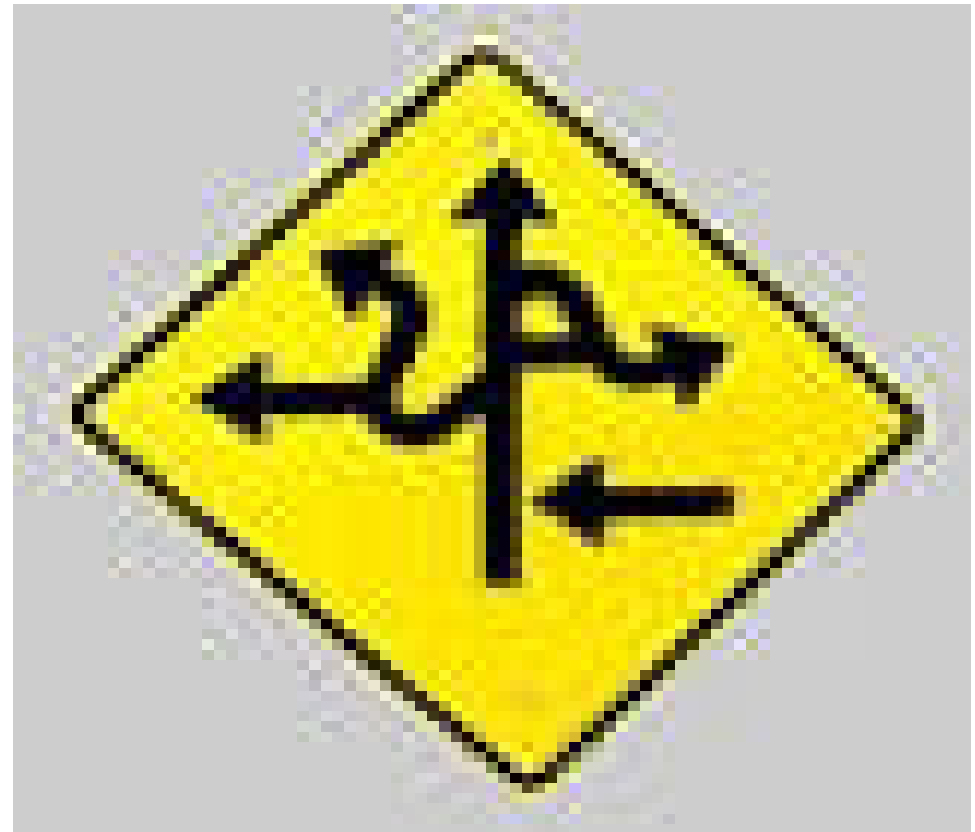
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# How Did We Get Here?

“If you don’t know where you’re going, any road will take you there.”

—Lewis Carroll



## Q: The Responsibility of HR is to . . .

- Protect the employee?
- Protect the company?

The answer will dictate how you approach every potentially “toxic” situation.

**A: *BOTH***

You must:

- Be an advocate but not an adversary
- Be trustworthy but not trusting
- Be objective and open at all times



# Employees Know Their Rights Now Better Than Ever

## Federal:

- Title VII
- ADA
- FMLA
- USERRA
- ADEA
- GINA
- FLSA

## State:

- Workers' Compensation
- State Human Rights Laws
- Jury Duty
- Voting
- Torts / Common-law Claims

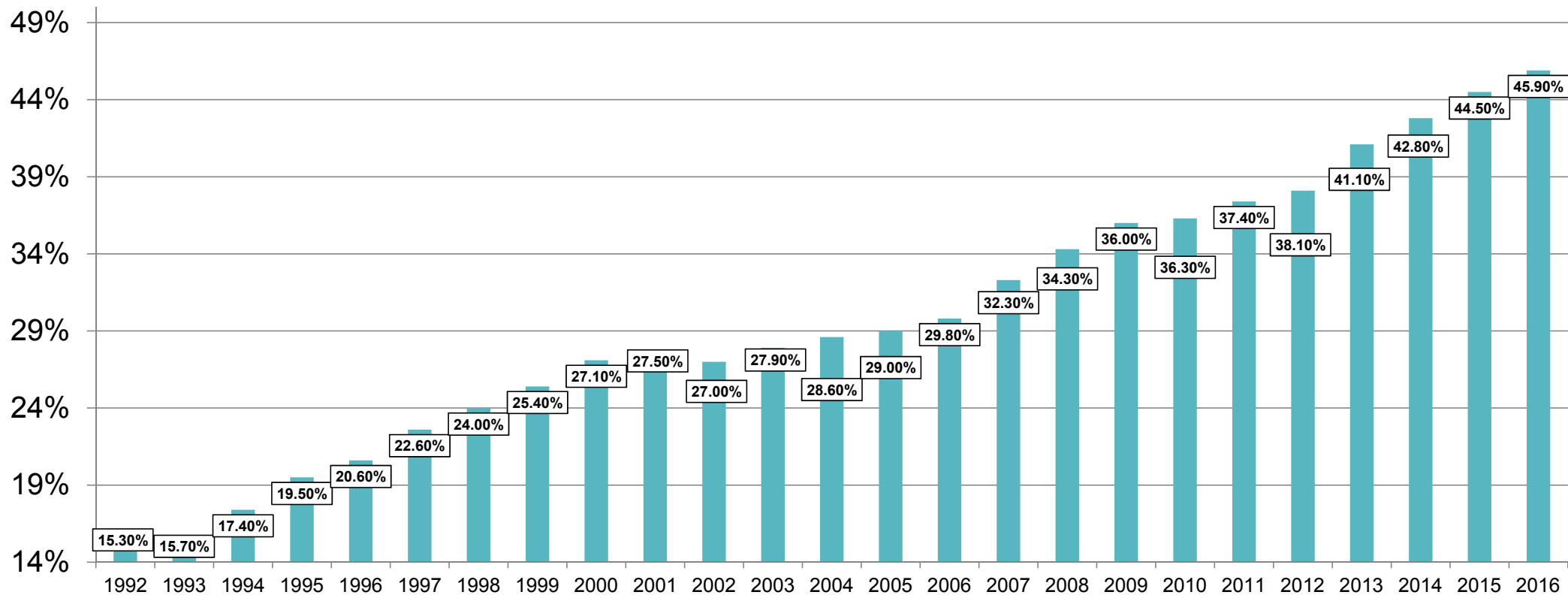
# The Rising Tide of Retaliation

- Monetary benefits paid by employers through EEOC proceedings have increased from just under \$120 million in 1992 to \$482 million secured through voluntary resolutions and litigation in FY 2016
- The EEOC reported that retaliation charges have skyrocketed during the last decade
- With more than 45.9% of the charges filed under all civil-rights statutes in FY 2016, **retaliation charges outnumbered every other category**



# The Rising Tide

## Retaliation Claims Alone



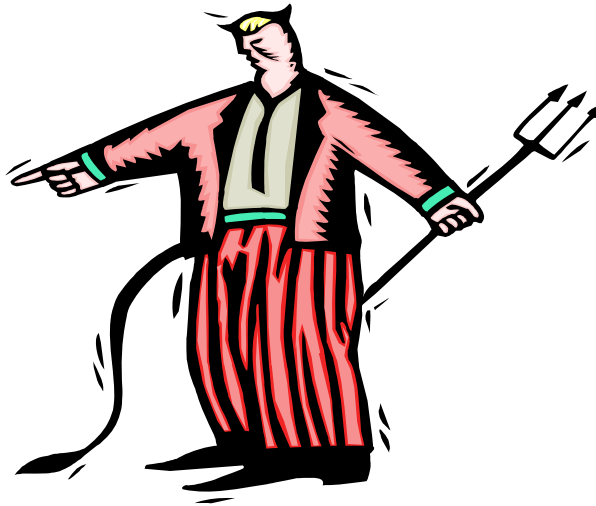
# Anti-Retaliation Protections Are Everywhere

- OSHA
- ADA
- FMLA
- Equal Pay Act (FLSA)
- FLSA
- Immigration Reform and Control Act (IRCA)
- ADEA
- FLSA
- NLRA
- Workers' Compensation Acts
- The Rehabilitation Act
- USERRA



# Today's Purposes

- Help you help your company and its employees navigate the retaliation minefield
- Help you to protect your company from havoc caused by employees from down under (and we don't mean Australia)



# Assessing Elmer

- What did Elmer do wrong at the meeting?
- What should Elmer have done before the meeting?
- What legal issues were raised in the meeting?
- What should be done after the meeting?

# Elmer's Mistakes

- Unprepared
- Did not stick to point
- Did not focus on job requirements
- Should have redirected conversation from John back to Erica
- Let Erica control the meeting
- Got too emotional/showed dislike
- Asked about medical issues
- Talked too long
- Dictatorial/made threats
- Reference to “family history” of medical issues
- Already on FWW (loss of credibility)

# Recognize Potential “*Pre-taliation*” Claims

- It is critical that managers know what to listen for
- In this vignette, Erica has made statements subtly threatening claims re:
  - Harassment
  - Discrimination
  - Workers’ Comp
  - Privacy
  - Whistleblower
  - FMLA
  - ADA



# Controlling the Conversation

## Focus on the performance

- Job requirements
  - Focus should be on job requirements and how they are not being met
- Remain focused and in control
  - Don't allow problem employees to take the focus away from the job requirements
  - Don't allow personal feelings to come into play
  - Comments about co-workers should be recognized and filed away to discuss with HR



# After the Meeting

- Partner with HR
- Identify the issues ***without*** conclusions / rash judgment
- Determine whether accommodation is required
- If so, engage in Interactive Process
- Fitness for duty evaluation?
- Investigate complaints of discrimination/harassment/retaliation
- Team training

# Are We Helping Build a Lawsuit?

- Warning words: “**harassment**” or “**hostile environment**”
  - Address them! Too many suits start with “management knew but....”
- Have you provided your supervisors and managers with adequate training on what their responsibilities are when they hear or see these warning signs?



# Here's HR's / Elmer's Schedule for the Next 4 Months...

## ***This month***

- Meet with lawyers to discuss Erica's complaint
- Answer Erica's interrogatories
- Gather documents for production of documents to Erica

## ***Next month***

- Meet with lawyers to prepare for taking of deposition by Erica's lawyer
- Have deposition taken by Erica's lawyer
- Attend Erica's deposition



# Assessing HR

- How did HR do?
- What issues were uncovered?
- What does HR need to do?



# The Good, The Bad & The Ugly

- Bad:
  - Did not take notes
  - Did not warn Elmer about no retaliation
  - Did not counsel Elmer on review of her medical file
- Good:
  - Convinced Elmer not to take immediate action
  - Listened without comment
  - Said she would contact legal
  - Requested all documentation



# What Claims Did Elmer (accidentally) Identify?

- EEOC complaints for harassment and discrimination and retaliation
- Worker's Compensation Retaliation
- Violation of privacy rights
- Whistleblower retaliation claim for reporting illegal wage and hour practices (not paying for mandated overtime)
- Retaliation for taking FMLA leave (recording the employee's tardiness, but not others)
- Failure to accommodate (ADA)



## Next Steps...

- Investigate
- Locate formal charges and respond
  - Counsel Elmer re failure to notify company of these filings
- Warn Elmer of no retaliation
- Interactive Process
- Preservation of documents/electronic files
- Warn Elmer not to discuss with others
- Involve next level manager
- Advise Legal Department



# Early Intervention

- Be Prepared: Supervisor training, policies, performance evaluations
- Be Patient: Avoid premature adverse action
- Take complaints and accusations seriously
- Focus on performance issues
- Be Careful: Give yourself a Miranda warning



# Did We Make Things Better or Worse?

- How did HR do?
- What needs to be done with Erica?
- What needs to be done with Elmer?
- What else should be done?

# Effective Performance Management

## Step 1: Damage Control

- What did HR do?
  - Acknowledged receipt of the various “pre-taliation” complaints
  - Promised they will be investigated and resolved according to company policy
  - Promised no retaliation for filing of the complaints and tells him/her how to file a complaint if the employee feels retaliated against in the future



# Effective Performance Management

## Step 1: Damage Control (cont'd)

- What did HR do?
  - Reminded the employee that notwithstanding the pending complaints s/he must adhere to all company policies, including attendance, and satisfactorily perform the functions of the position
  - Advised that if the employee is physically unable to perform the essential functions, s/he should notify HR, which upon submission by the employee of appropriate documentation from the employee's treating physician, will initiate the interactive process to determine what, if any, reasonable accommodations are available and appropriate
  - Advised that the employee will receive a follow-up memo confirming the substance of the meeting



# Effective Performance Management

## Step 2: HR Follow-Up

- Coaching/discipline for supervisor
- Training for supervisor/employee
- Follow-up with employee on complaints
- Follow-up with next level manager



# Effective Performance Management

## Step 3: HR Assesses the Situation



- Clearly identify and communicate performance issues
- Where possible, focus on objective criteria
- Fairly and consistently applied?
- Subjective criteria
- Require more detailed explanation
- Any reason to believe evaluators are biased?
- Can evaluators articulate criticisms?
- Did employee have a fair opportunity to correct performance issues?

# Effective Performance Management

## **Step 4: Risk Assessment**

- Everything you say or do may be used against you in a court of law
- Identify and evaluate decision-makers as potential witnesses
- Any biased or problematic decision-makers?
- Identify potential comparators
- Evaluate your documentation
- Record of performance issue before complaints?
- Control communications





# Performance Documentation

# Question

- You're a juror on a big wrongful termination lawsuit. You have heard both opening statements — one extolling the former employee's virtues, the other explaining why the employee's work performance required termination. What do you want to see?

## Performance Documentation

# Why is Documentation Important?

- It prevents later denial
- Aids your memory
- Minimizes misunderstandings
- Provides emphasis
- Reveals patterns
- Supports future action taken toward that employee
- Gives your successor a foundation

# Getting It Right – Key Questions Before You Document

- What is the purpose?
- Is this an urgent situation?
- Who is involved?
- Who will see this document?



# What You Need to Document

- EVERYTHING!
  - Formal discipline
  - Informal counseling
  - Problems
  - Meetings
  - Incidents
  - Positive Feedback





# When Should You Document?

- As soon as possible after an event occurs / is reported
- As often as the problem requires it
- As part of a regular review process

# Types of Documentation

- Formal corrective action notice
- Memo summarizing verbal warnings & directives
- Handwritten notes
- Chronologies
- Meeting agendas/minutes
- Email
- Reports of investigations
- Telephone/attendance records
- Performance appraisals



# Getting It Right

## What Should You Include?

- Date, location & time of incident(s)
- Date of memorandum
- Detailed description of employee's conduct
- List of specific examples (current and past)
- Names of people involved/witnesses
- Which rule or policy is implicated
- Consequences/discipline and what employee must do to correct behavior
- What will happen if the behavior continues
- Objective recording of your observations

## Dropping the Ball...

- Lack of proper documentation
- From a jury's perspective, if it is not in writing, it didn't happen
- Contemporaneous = increased reliability
- Some jurors may also be distrustful of documentation that is "over the top"
- Failure to follow-up (if you say you are going to do something, do it!)

# What Not to Include!

- Personal opinions
- Legal conclusions
- Hearsay, gossip, rumors
- Information about a medical diagnosis
- EEO status
- References to prior irrelevant history



# Examples of Ineffective and Effective Documentation

## **Effective:**

Tony complained that his manager called him “gay” and “weirdo” last week on Wednesday. He also says this is a “weekly” occurrence. Last month (early), Tony said his manager swat him on the buttocks. No witnesses.

**Ineffective**

**Tony has been sexually harassed because he's gay.**

# Effective Performance Management

1. Everything you say or do may be used against you in a court of law
2. Identify and evaluate decision-makers as potential witnesses
3. Any biased or problematic decision-makers?
4. Identify potential comparators
5. Evaluate your documentation
6. Record of performance issue before complaints?
7. Control communications





# Thank You!

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