

# Issues in Employment Law

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# Issues in Employment Law

- Retaliation Claims
- State employee whistleblower claims
- Handling Internal Complaints

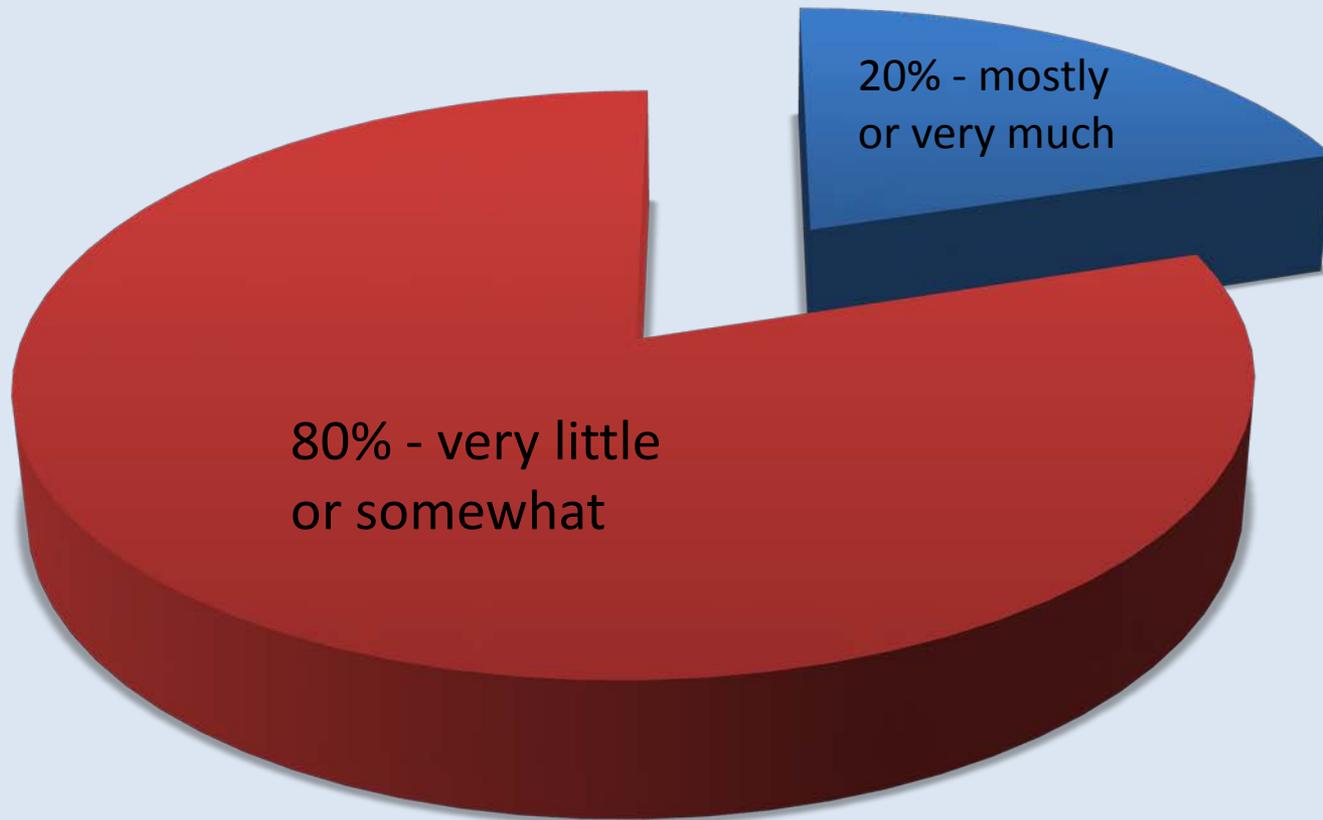
# Retaliation

Fastest growing segment  
of employment claims

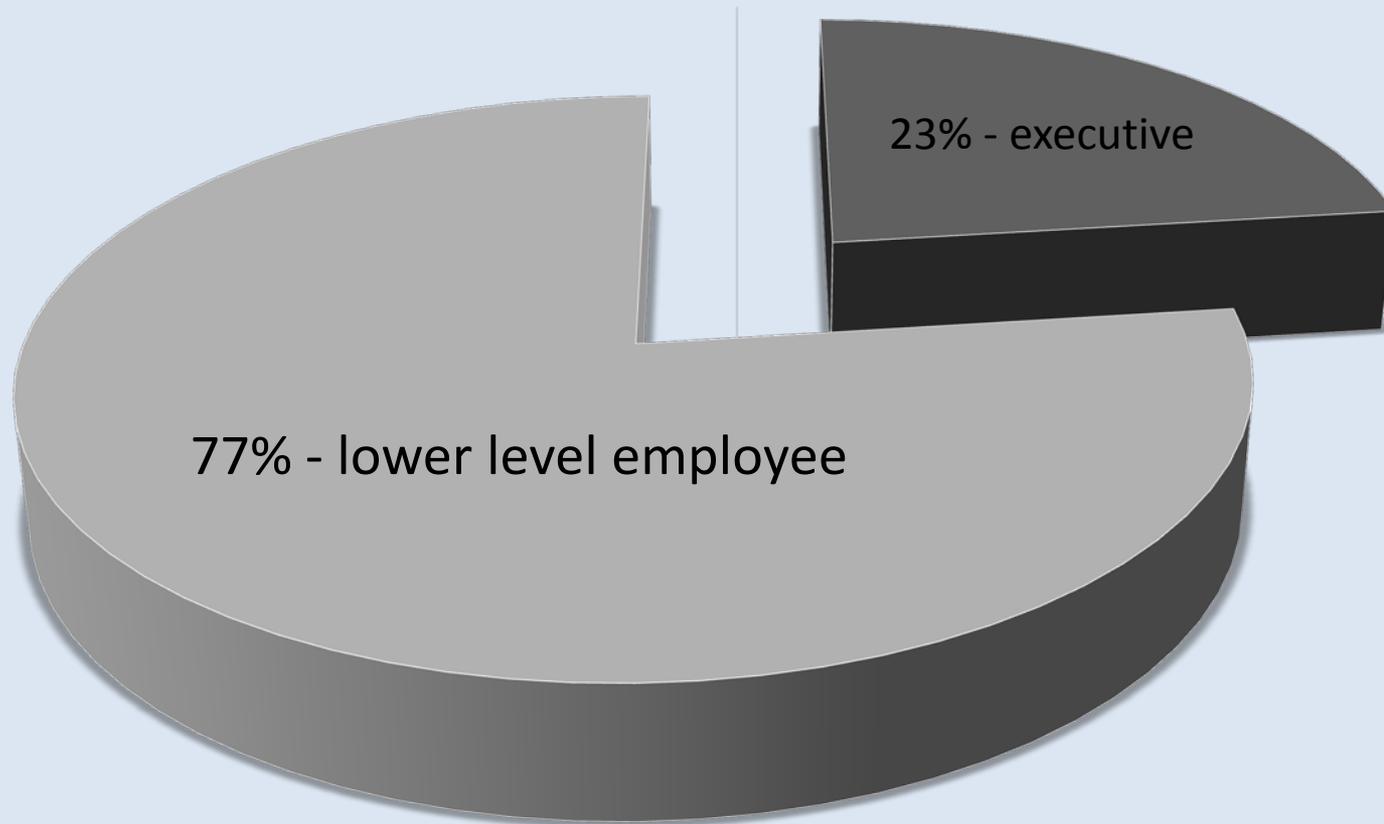
# Why do retaliation claims appeal to jurors?



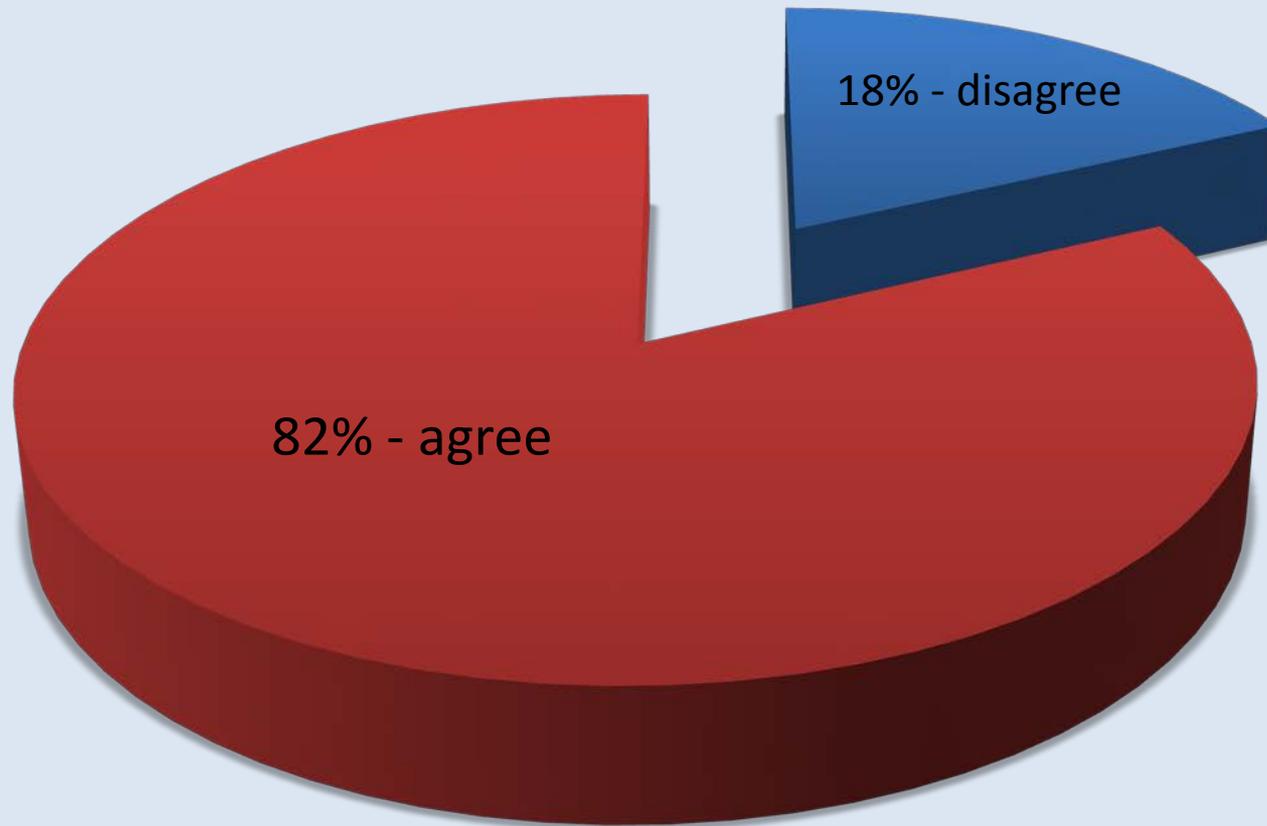
“Business executives share my values.”



“Would you tend to believe an executive or a lower level employee?”



“If an employer could benefit financially by lying, it’s probable that it would do so.”



# State Whistleblower Claims

## Hudson v. Dept. of Health

- WD77055, October 21, 2014
- 1<sup>st</sup> case to interpret Mo. Rev. Stat. Sec. 105.055, Missouri employee whistleblower protection act
  - No supervisor or appointing authority of any state agency shall:
    - (1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:
      - (a) A violation of any law, rule or regulation; or
      - (b) Mismanagement, a gross waste of funds or abuse of authority, or a substantial and specific danger to public health or safety, if the disclosure is not specifically prohibited by law; or
    - (2) Require any such employee to give notice to the supervisor or appointing authority prior to making any such report.

# Dealing with Internal Complaints

# PURPOSES OF EFFECTIVE COMPLAINT HANDLING

- Prevent Discrimination.
- Remedy Discrimination.
- Prevent or minimize employer liability.

## KEYS TO EFFECTIVE COMPLAINT HANDLING

- Prompt, thorough (and documented!) investigation of complaints.
- Prompt and appropriate corrective action.

# EMPLOYER LIABILITY FOR SUPERVISOR HARASSMENT:

- Automatic employer liability for supervisor harassment that results in a tangible employment action – e.g., termination, demotion, etc. [*Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *see also* 8 C.S.R. 60-3.040(17)(D)].
  
- If a supervisor’s harassment does not result in a tangible employment action, the employer can assert an affirmative defense, by proving that:
  - (1) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise; and
  - (2) the employer exercised reasonable care to prevent and correct promptly any harassing behavior.[*Ellerth-Faragher* cases, *supra*; 8 C.S.R. 60-3.040(17)(D)]
  
- EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors”  
[[www.eeoc.gov/policy/docs/harassment.html](http://www.eeoc.gov/policy/docs/harassment.html)]

# EMPLOYER LIABILITY FOR CO-WORKER HARASSMENT:

- An employer will be liable for harassment by co-worker(s) if, among other things:
  - (1) the employer knew or should have known of the harassment; and
  - (2) the employer failed to take prompt and effective remedial action.

[*Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. App. 2006)]

# LAW-DRIVEN POLICIES & PROCEDURES

## ➤ ANTI-HARASSMENT / DISCRIMINATION / RETALIATION POLICY:

- Verify each employee's receipt and understanding of the policy.
- Provide strong non-retaliation section that:
  - Defines who is protected, including complainants, witnesses and others participating in the investigation process.
  - Makes it clear that the employer will neither engage in nor tolerate retaliation.

# LAW-DRIVEN POLICIES & PROCEDURES

## ➤ COMPLAINT PROCEDURE:

- Provide multiple paths to lodge complaint:
  - Not just to an employee's supervisor.
  - Other supervisors also.
  - Designated HR personnel.
- State that a complaint will be investigated promptly and thoroughly, and if substantiated, appropriate corrective action will occur.

# LAW-DRIVEN POLICIES & PROCEDURES

## ➤ EMPLOYEE AND SUPERVISOR TRAINING:

- How to recognize unlawful or inappropriate workplace conduct.
- Complaint reporting procedure.
- Report to HR all complaints of potential harassment, discrimination or retaliation. All complaints include:
  - Complaints that concern seemingly trivial misconduct.
  - Complaints that an employee suggests don't need to be investigated.

# PREPARING FOR THE INVESTIGATION

# PRELIMINARIES

- Review complaint and determine if interim action is needed:
  - Separation of complainant and accused during investigation.
  - Assignment of different supervisor, if complainant has accused his/her supervisor.
- Determine who will conduct investigation:
  - Designated HR employee (usually, absent conflict).
  - If there's a conflict, consider using a third party.
  - Use two investigators, if possible.
- Conduct thorough document review:
  - Electronic data (including emails).
  - Personnel records of potential interviewees.
- Determine preliminary list/order of interviewees.
- Prep outline for each witness.
- Consider recording the interviews.

WITNESS INTERVIEWS:  
THE “MEAT” OF THE  
INVESTIGATION

# TIPS APPLICABLE TO EACH WITNESS INTERVIEW

- Explain role of 2<sup>nd</sup> investigator at the outset.
- Advise that info provided will be shared on a limited need-to-know basis.
- Admonish witness to maintain confidentiality.
- Assure witness that retaliation is prohibited and should be reported.
- Focus on open-ended, non-leading questions – the 6 “W’s”.
- Encourage witness to follow up if they recall something else post-interview.
- Secure witness review/signature of typed interview summary or statement.

# INTERVIEWING THE COMPLAINANT

- Explain that thorough, impartial investigation will occur; that appropriate action will be taken.
- Advise that it will be necessary to interview other witnesses.
- Remain neutral/do not appear to take sides.
- If complainant becomes emotional, take a break.
- Provide estimated time frame for investigation and action.
- Advise that complainant (and accused) will be contacted once investigation is completed.

# INTERVIEWING THE ACCUSED

- Advise that employer is legally obligated to investigate and advise that due process will be observed.
- What if accused refuses to cooperate?
  - Let them know that this is their opportunity to respond to the allegations AND state them.
  - Let them know that if they don't talk, findings will still be made, but without their input.
- Advise that if misconduct is found, discipline may be imposed.
- Convey that retaliation will not be tolerated.
- Advise that accused will be contacted once investigation is completed.

# INTERVIEWING POTENTIAL CORROBORATING WITNESSES

- Limit disclosure of information about the situation to other witnesses as much as possible:
  - Try to elicit identity of complaining and accused employees from witness, vs. identifying them at outset.
  - Once names are on the table, ask, “What has it been like working with [accused]?” vs. “Did [the accused] do XYZ to you?”
  - Ask, “Has [the accused] ever done anything inappropriate in the workplace?” vs. “Did [the accused] do XYZ to you?”

# EVALUATING THE FACTS AND MAKING A DECISION

- Investigator should issue prompt, written findings re the complaint, including:
  - A summary of the incident or issues investigated.
  - Whether the alleged misconduct is substantiated or unsubstantiated.
  - Whether policy has been violated (CAREFUL re finding that “unlawful harassment occurred” vs. inappropriate conduct).
- Investigator should quickly report findings to corporate decision-makers to enable prompt decision and corrective action.

# CORRECTIVE ACTION

➤ Factors to be considered for potential corrective action:

- Seriousness of the misconduct.
- Accused's employment record.
- Discipline imposed for prior similar misconduct.
- Whether there's a progressive discipline policy.
- Consistency is key.

# CORRECTIVE ACTION

## ➤ Choosing corrective action:

- Termination.
- Demotion/Transfer/Reassignment.
- Suspension.
- Wage Reduction.
- Counseling/Refresher Training.
- Consider whether there is a need to modify and/or redistribute workplace policies.

## ➤ Document the corrective action chosen and rationale.

# CORRECTIVE ACTION

## ➤ Disclosure and follow up:

- Specific discipline usually should not be disclosed to complainant or other employees.
- Rather, employer should advise that it is taking steps to prevent recurrence of the misconduct.
- Corrective action does not conclude the matter.
- Investigator should set a timeframe to follow up with the complainant to ensure that the misconduct has not continued and to remind complainant to report further misconduct or any other concerns.