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On Behalf of the
Society of Human Resource Management

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“Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention”
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Introduction

Chair Yang and distinguished Commissioners, thank you for the opportunity to speak to you regarding the serious issue of retaliation in the workplace. I am Sharon L. Sellers, president of the HR consulting firm, SLS Consulting, LLC, headquartered in Santee, South Carolina, and I have been a member of the Society of Human Resource Management for over twenty years. Currently, I am the State Director for the South Carolina SHRM State Council.

I have thirty years’ experience working in the field of human resources. The first 19 of those years were spent as a senior HR generalist in the healthcare, manufacturing, and government contracting industries. In 2004, I established SLS Consulting, LLC, a human resources services and training firm. My clients range from start-ups to global organizations in all major industries. In addition to my consulting firm, I am also an adjunct instructor at Trident Technical College in North Charleston, South Carolina where I have taught human resources courses for the past ten years.

I come before you today as a human resource professional with approximately one-half of my consulting practice involving providing clients with the infrastructure to create sound policies and practices to establish a diverse and inclusive workforce free from harassment, discrimination, and retaliation. I also appear before you as twenty-year volunteer for SHRM.

As you may know, SHRM is the world’s largest HR membership organization representing over 275,000 members in over 160 countries. It is SHRM’s mission to proactively provide our members with educational resources on workplace law compliance, effective HR practices and strategic workforce issues. We supplement this information with research on critical HR issues and benchmarking data to help our members incorporate the HR strategies of successful organizations. In addition to conference programming and webinars, SHRM provides sample whistleblower policies, sample codes of ethics and business conduct as well as information on how to conduct an ethics audit and a retaliation prevention checklist.

Establishing an Anti-Retaliation Infrastructure

Approximately one-third of my clients are owners of foreign entities who are creating start-ups in the United States for the first time. These clients are headquartered in countries where there are varied levels of legislation and enforcement regarding discrimination and harassment in the workplace, such as Canada, the United Kingdom, Germany, Italy, China and others. I also help U.S. start-ups and small businesses create an infrastructure free from harassment, discrimination and retaliation. In addition, a portion of my services include conducting investigations for clients who have in-house complaints of harassment and discrimination including retaliation complaints. By working with such a diverse client base and by conducting investigations over the past decade, I have observed common pitfalls and have addressed many of these observations in policies and programs I’ve created to assist my clients which I will share with you today.

Retaliation claims have become the most frequent and potentially costliest workplace disputes. Retaliation claims lodged with the Equal Employment Opportunity Commission (EEOC) have
increased steadily, surpassing all other types of discrimination claims filed with the agency. In 2014, retaliation claims accounted for over 43 percent of the over 88,000 claims filed. 

When working with clients, it’s fundamental to a successful program to include traditional harassment, discrimination and retaliation awareness as well as diversity and inclusion components. In addition, it’s also very important to reference the latest elements from Supreme Court opinions and guidance from the EEOC. I will briefly cover the issues of creating sound policy, training managers and non-managers, prompt investigations including follow-up, and consistent documentation, as well as my own “lessons learned.”

Retaliation in the workplace may be defined as a form of unlawful discrimination that occurs when an employer, employment agency or labor organization takes an adverse action against an employee or other covered individual because he or she engaged in a protected activity, including filing a charge of discrimination with a fair employment practices agency or participating in an investigation of alleged workplace misconduct. Before we get to specific recommendations for designing and implementing workplace programs that help prevent retaliation, it is important to address what I believe is the single most important element -- the culture of the organization.

The Importance of Culture

In the early 1990’s, I was the HR director of a 500-employee textile manufacturer with a diverse workforce. I was new in my position. My HR assistant was African-American and wise beyond her years. My first major challenge involved two male employees, one white and one black, who had been friends since grammar school. Someone overheard one call the other a racist term, and reported the conversation to management. Even though the two friends defended each other, tried to explain that they were best friends and this was how they conversed, this event triggered a powder keg of pent-up hostilities among the workforce involving race. We dealt with the catalyst issue promptly through an investigation and swift disciplinary action to prevent similar incidents from recurring, but we realized that this incident was a sign of a much bigger challenge. We were surprised. One of our owners was himself from a Middle Eastern country. When the company had been purchased two years prior and he came to the helm, he made it clear that discrimination or harassment of any type, especially involving race and national origin, would not be tolerated. So why did we have this explosion when one incident occurred? I felt that suddenly every decision we made regarding promotions, demotions, or work schedules was being questioned regarding race. I remember literally holding my head in my hands and asking my assistant, “How can we make everyone get along with each other?” She then relayed a quote from her mother and I have since learned that it is a derivation of a centuries-old adage: “If you change a person’s mind against his will, he is of the same opinion still.”

The above quotation has stayed with me for the past twenty-five years and over time its meaning gets clearer. We as employers cannot simply make rules that employees must follow and expect

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that if they are made to act a certain way, their hearts and minds will follow. Similarly, while a government entity can establish laws and regulations with penalties for violations, it does not necessarily follow that everyone in the workplace will positively embrace these laws and regulations. With regards to harassment and retaliation, we must include intermediate steps to explain why, to offer insight, and to show how “the new way” really is better than “the old way.”

To persuade senior leadership of an organization, human resources professionals should make a business case regarding diversity and inclusion. This business case, far removed from simply stating that “we need to do this to stay in compliance with federal law,” includes sharing information such as the following:

- Respectful treatment of employees leads to job satisfaction and employee engagement. In SHRM’s 2015 Employee Job Satisfaction and Engagement Survey, 72 percent of participants rate the TOP contributor of overall job satisfaction as “respectful treatment of all employees.”
- “Studies show that companies with an engaged workforce turn in a better financial performance. Organizations on Fortune’s list realized annualized stock market returns of 11.8 percent between 1997 and 2003, according to Great Place to Work, compared with 6.04 percent for the S&P 500. Across industries, employers on the list saw lower turnover: 8 percent compared with an industry average of 16.2 percent in IT, for example, or 24.5 percent compared with an average 38 percent in hospitality.”
- Qualified, desirable applicants may not be inclined to apply for positions with organizations that have a reputation of harassment or discrimination or that do not make a conscious effort to include diversity in their employer branding.
- In remarks at the 2015 SHRM Employment Law and Legislative Conference, former Wall Street Executive Sallie Krawcheck, owner of Ellevate, a networking organization, identified events such as the recent financial crisis in 2008 as a result of “groupthink.” People with similar backgrounds and experiences tend to think the same way. The opposite of “groupthink”, according to Krawcheck, is “diversity.” “The diversity of thought, of perspective, of gender, of complexion can drive the best team…”

By establishing the “business case,” human resources professionals are able to work with senior management to increase awareness and communicate that it is in the best interests of the organization to identify potential discrimination and remove the undesirable behavior from the organization as quickly as possible.

For mid-level managers and non-management employees to fully understand its importance, the communication of diversity and the adherence to workplace policy designed to prevent

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discrimination and harassment must start at the top level of management. Simply stating a policy without leading the effort will not be successful. In addition to telling the employees about the program, senior leaders should set an example and create a diverse management team to consult when making business decisions.

In my opinion, employers too often focus on “diversity” and forget about “inclusion.” Although executives may recruit employees from protected classes into the organization, they sometimes miss the opportunity to build a true team. A typical example would be culminating a management retreat with an activity such as attending a sporting event or an event that would traditionally attract only a certain gender or race. In “selling the anti-discrimination program,” senior management needs to work continually to see that all employees feel included in the workplace. That includes encouraging diversity and inclusion in the board room as well as in the lunch room.

Creating an effective anti-discrimination culture can include:

- Create a diversity “kick-off” campaign led by senior executives explaining the importance of the program.
- Create diverse employee focus groups that can be challenged to call to the attention of management barriers to an inclusive culture and offer corrective actions to overcome the barriers.
- Develop a program to create, discuss and communicate the diversity values of the organization and the consequences of failing to adhere to these values.
- Provide an environment where employees of all levels are encouraged to openly discuss corporate communications or practices that may appear to be adverse or offensive to protected groups.
- Openly educate employees about cultural differences and promoting an atmosphere where employees are allowed to respectfully ask questions about customs.

It has been my experience that creating a sound company culture that continually enforces the organization’s anti-discrimination program can encourage more open discussions regarding diversity, fewer complaints of discrimination and harassment, and higher employer engagement.

**Workplace Policy**

Employers should understand that it is in their best interests to find out about and stop discriminatory and harassing behavior in the workplace. A first step is creating a clearly written policy which includes the following elements:

- Statement that the organization prohibits harassment and discrimination including a list of the specific types of prohibited discrimination (these may vary depending on the state or states where the entity operates).
- Clarification that the policy applies to all persons in the workplace – owners, managers, non-management employees, vendors, clients or others in the workplace.
organization prohibits harassing behavior toward these persons or by these persons toward others).

- Definitions of discrimination and harassment.
- Examples of harassing behavior in the workplace, including sexual harassment examples.
- Explanation of the complaint procedures and preferred methods of reporting for example -- to whom to report, how complaints may be made: written, oral, or through the use of a reporting hotline, and that the complaint will be kept confidential to the extent possible.
- Statement that retaliation toward a complaining party or witness is prohibited, a definition of retaliation, and a reference to the previous procedure regarding how to file a complaint should retaliation occur. In some cases, employers might consider creating a separate policy on anti-retaliation.
- Prompt investigation of any issue.
- Confirmation that, should harassment or discrimination occur, the employee could face disciplinary action, up to and including termination.

**Lessons Learned**

In our anti-discrimination policies, we ensure that there are at least three different individuals to whom the employee can file the complaint. We want to ensure that there are other people in addition to the supervisor listed in the event that the supervisor is the alleged wrongdoer. Whenever possible, we ensure that both a male and a female person are available to receive the complaint. The discussion of violation of a policy, especially in the case of sexual harassment, can be difficult for employees and having a choice can make employees more comfortable making a report. We also encourage our clients to post a toll-free reporting line or the number of their Employee Assistance Plan as alternative methods for employees to report complaints. Again, our focus is to provide many methods for the employee to file his or her complaint as it is in the employer’s best interest to learn of and stop the behavior as quickly as possible.

**Employee Training**

Once the policy has been carefully written and reviewed by the organization’s legal counsel, we encourage the organization to have a policy rollout meeting that includes a detailed training on the policy as well as a discussion of diversity in the workplace. In our training, we discuss the most common employment laws that have discrimination, harassment or retaliation elements. These include the following for private sector employees:

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967 (ADEA)
- Equal Pay Act of 1963 (EPA)
- Americans with Disabilities Act of 1990, as amended (ADA & ADAAA)
- The Health Insurance Portability and Accountably Act of 1996 (HIPAA)
• Genetic Information Nondiscrimination Act of 2008 (GINA)
• Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
• Family and Medical Leave Act of 1993 (FMLA)
• Workers Compensation

And the addition of the following for federal agencies and/or federal contractors:

• Rehabilitation Act of 1973
• Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)
• Executive Order 11246

In our training we discuss each of the above laws, as well as other laws such as portions of the Sarbanes-Oxley Act or False Claims Act that have retaliation and whistleblower provisions, if appropriate. We recommend a straight-forward approach in our trainings that encourage and promote respect for each other. We encourage the employer to use case studies where possible to show application in the workplace.

In the employee training, we encourage employers to take the most-recent statistics from the EEOC website that discuss the number and type of claims filed during the year. Proportionally, these claims have shown year-to-year that retaliation has the largest number of claims, followed by race and sex. We encourage employers to be honest regarding retaliation and give examples of retaliating behavior.

Employers are encouraged to discuss with employees the following steps that they take to try to prevent retaliation and to ask for employees’ assistance in trying to stop retaliation from occurring.

**How ABC Company Reduces Retaliation**

• The employer will keep the details of the complaint – whether in house or from an outside agency – as confidential as possible.
• The employer will only discuss the issue with only those “who need to know” in order to answer the complaint or investigate the claim. Was the person’s supervisor involved? If not, then HR may not involve the supervisor at all.
• Potential witnesses may be asked about an incident but may not be told the whole story.
• The employer may ask participants for temporary confidentiality during the investigation if so warranted based on specifically stated reasons.5

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5 This more limited confidentiality is based on the recent case from the National Labor Relations Board, Banner Health System d/b/a Banner Estrella Medical Center, 358 NLRB 93 (2012).
• Once the investigation is completed, only those directly involved – the complaining party, the alleged wrongdoer and the supervisor, if appropriate, will be told of the outcome.

• The employer representative – human resources and/or the employee’s supervisor – will periodically follow-up with the complaining party to determine if, in fact, the behavior has stopped (if the wrongdoer is still employed with the company), and to ensure the complaining party is not experiencing any retaliating behavior.

In addition to all-employee training, employers should conduct separate training for managers and supervisors to discuss their responsibilities when they receive complaints or witness potentially discriminatory or harassing behavior. Supervisors should also be trained to monitor the treatment of employees who complain of discrimination or who provide information related to discrimination complaints to ensure that they are not subjected to retaliation. Any proposed adverse action against a discrimination complainant or witness should be carefully scrutinized by HR to ensure it is based on a legitimate and not retaliatory reason. It is also important to discuss, both with complaining parties and as part of manager and employee training, what constitutes retaliation and what does not. Things can be uncomfortable between people after a complaint has been filed and an investigation has occurred. Feelings have likely been hurt, however, “petty slights” such as not wanting to go to lunch with someone does not constitute unlawful retaliation. On the other hand, a supervisor taking away an employee’s telecommuting arrangement might constitute retaliation.

Lessons Learned

When conducting workplace training, many employers seek ways to ensure that training is constantly updated and reinforced. Many instructors and employers have expressed that they have difficulty finding “fresh” material to train their long-term employees. Our firm has found that using a variety of instructional methods help keep employees engaged when conducting this retraining. These include instructor-led training integrating some lecture, interactive discussions, films, group exercises, and presentations.

Many employers also enjoy various approaches to e-learning from webinars to customized, interactive training software. E-learning is especially helpful for today’s flexible schedules, telecommuting and technology-savvy workforce. As discussed in the SHRM publication, Transforming HR through Technology: The Use of E-HR and HRIS in Organizations, the authors identify concern that employees may not learn or even actively “attend” on-line training other than simply signing in. In order to determine if employees are actively engaging in the online training, some employers have developed assessments for employees to complete to determine if they did actively listen and learn the material. Whether using the latest technology or presenting material in person, we have found that employees need and appreciate a variety of delivery methods, such as blended learning, with up-to-date information and realistic examples.6

Prompt Investigations and Determination

Complaints of discrimination or harassment can be emotional for all of the parties concerned: the complaining party, the alleged wrongdoer, the witnesses, the managers, and the HR professional. High emotions can lead to a stressful working environment. For this reason, it is essential that the investigation be conducted and a determination made quickly. As such, it is important that those employees who receive the complaint know what actions to take immediately to start the investigation. The actual action taken will depend on the specific situation and on the structure of the organization. Some processes can be established well in advance focusing on the following issues:

1. Are all managers trained to take a complaining party’s statement or should a manager who is approached escort the complaining party to another person to formally receive the complaint?
2. Should all complaints be forwarded to a centralized location for action or is each branch, division, etc. empowered to go forward with an investigation?
3. If a manager is the alleged wrongdoer, will the employer use an outside investigator to ensure objectivity? At what level of management is the outside investigator required?

Other issues may need to be considered on a case-by-case basis:

1. Do the complaining party and the alleged wrongdoer work in the same work area?
2. Will the persons involved have difficulty continuing to work together during the investigation?
3. How can the employer separate the two employees without negatively impacting the complaining party – which may be perceived as retaliation?
4. Is the alleged violation so extreme that the alleged wrongdoer needs to be suspended until the investigation is completed?
5. Has a criminal act occurred (such as a rape or assault)? Should the police be contacted?

Employers should ensure that in-house or outside investigators are properly trained on investigation techniques, have flexible work schedules allowing them to immediately begin an investigation, are thorough investigators, and can prepare detailed reports of their findings.

Lessons Learned

Delays in conducting investigations often lead to additional complaints of retaliation. With delayed or no communication that an investigation has begun, complaining parties may become hyper-sensitive to reactions from employees or supervisors, even from those who have no knowledge of the complaint. The reactions may actually be retaliatory or they may just be daily interactions that are suddenly perceived as retaliatory. Many of these situations can be avoided if the investigation is conducted and a determination is made as quickly as possible.

Employers should consider the following effective practices:
Designate and train more than one person to receive complaints or to conduct investigations, ensuring that there is back-up in the event an investigator goes on leave.

If the employer uses a third-party company that receives complaints and then forwards them to the organization for action, it should identify individuals within the organization with which the outside company should follow up to ensure the information was received. An employer does not want to risk having the third party company leave a voicemail with someone who is out of the office for an extended period of time.

Take all complaints seriously and conduct objective investigations. Do not explain away potential illegal behavior as a “personality conflict.”

The Importance of Documentation

A final element for discussion with regard to creating an effective anti-retaliation program is clear and consistent documentation procedures. Supervisors should be trained in the company’s procedures regarding how to document both good employee performance as well as performance that needs improvement. There are many business reasons for employers to encourage proper documentation regarding employee performance:

- Employees have a higher satisfaction in workplaces where all employees are treated with respect.
- Clear communication regarding good performance helps reinforce behavior so it can be repeated.
- Clear communication regarding poor performance helps give employees direction so they can succeed in the workplace. Employees’ successes in their jobs lead to organizational success.
- In the unfortunate circumstances where employees do not improve their performance, proper documentation provides evidence that the employer legitimately tried to assist the employee in improvement and that the decision to terminate was not based on discrimination or retaliation.

Lessons Learned

Employers should impress upon their supervisors the necessity for proper documentation. Without it, employees are unsure if they are doing their jobs properly and organizations are putting themselves at risk for discrimination and retaliation claims. Proper documentation can show consistency in adherence to policies whereas lack of documentation may give the perception of discrimination. Consider the following example:

For about a year, Mary has been making errors in manufacturing the very expensive products in her line. Mary filed a sexual harassment complaint against a supervisor three months ago. An investigation was conducted and the supervisor was terminated. This week, the customer sent back 30 defective items and 25 items were manufactured by Mary. Her supervisor terminated her immediately. There was no documentation that he ever counseled Mary about her performance. Mary filed a complaint with the EEOC that
the company retaliated against her because of her harassment complaint. In retrospect, providing Mary with proper documentation regarding her performance may have assisted Mary in correcting her errors or may have resulted in her being retrained to avoid the errors. If Mary did not correct her errors, proper documentation would have shown that Mary was on notice about her performance and that the supervisor had been working with her to improve in order to keep her position. Such documentation would provide evidence that this performance issue was ongoing long before her harassment complaint occurred.

Our consulting firm maintains an “on-call” relationship with most of our clients. We often receive calls regarding employee performance, disciplinary action or the possible termination of employees. We normally ask the following questions: What documentation do you show in the employee’s file that demonstrates you have tried to correct this behavior in the past? What precedent has been established regarding actions you have taken with other employees who have committed this violation in the past? It is not surprising to have a small business owner explain that he discussed the issue with the employee many times, but because he was so busy he forgot to document the meeting. Although time-consuming, it is essential for employers of all sizes to document discussions with employees regarding employee performance.

**Employee Pay Disclosure**

While our discussions throughout this testimony have focused on retaliation with regard to Title VII and related discrimination laws, there has also been recent interest in the issue of potential retaliation in response to employee pay discussions. SHRM endorses the opinion that prohibiting an employee from discussing his or her *own pay* is in conflict with Sections 7 and 8 of the National Labor Relations Act (NLRA). Our firm does not create policies that prohibit employees from disclosing his or her pay. We do prepare policies that prohibit supervisory and financial personnel from publically disclosing *other employees’ salary* information should they have access to this confidential information.

**Conclusion**

When confronted with compelling evidence of the “business case,” employers understand that an effective anti-retaliation program increases employee engagement, improves organizational performance, and reduces complaints.

In order for an anti-retaliation program to be effective, employers should create a culture where employees respect each other and where open communication regarding diversity and inclusion is encouraged. Senior management must lead this effort in order to encourage buy-in from middle management and first line employees.

In addition to culture, an effective program should include specific elements such as a clearly written policy, training for employees as well as management, and prompt and detailed investigations.
To further reduce retaliation complaints, employers must conduct detailed supervisory training to instruct managers in proper documentation regarding performance management. Accurate documentation can assist employees in understanding and improving poor performance which may help them succeed in their positions. Such documentation also provides clarity of the intent behind employee management decisions.

Alleviating retaliation and discrimination in the workplace is important to employers. Employers want these behaviors out of their organizations so they can focus on assisting their employees in succeeding which will, in turn, allow their organizations to succeed.

Thank you for the opportunity to discuss these critical issues. SHRM and its members encourage a continued dialogue with the EEOC on this and other important workplace topics.