



## Use Caution When Conducting Wage Surveys

By Danielle Urban (Denver)

Conducting wage surveys to determine whether healthcare workers, particularly nurses, are being paid competitively is nothing new. They can be helpful in determining whether a particular employer might need to raise wage levels to minimize turnover and remain an attractive employer in a competitive field. But if not done carefully, such surveys can land you in the middle of an anti-trust law suit defending your company from allegations of collusion.

### How Courts View The Problem

In March of last year, two Albany-area hospitals settled class claims alleging that the hospitals had colluded to keep nurses' salaries artificially low. The settlement, for \$1.25 million, was reached after the court agreed to certify a class of more than 2,000 area nurses. Similar lawsuits have been filed in the past few years in Chicago, Detroit, Memphis, and San Antonio, alleging, among other things, that the hospitals sharing of compensation information was evidence of a conspiracy to keep salaries artificially low.

And a Michigan court has ruled that the fact that a hospital's nurses were largely unionized did not shelter it from anti-trust claims, even though the hospital argued that its nurses' wages were not set through a competitive process, and therefore could not establish the "requisite anti-trust injury." *Cason-Merenda v. Detroit Med. Ctr.*

In reaching its decision, the court held that the hospital had not sufficiently shown that the collective bargaining process "exists entirely outside of, and wholly insulated from, the separate 'competitive arena' in which Defendant and other Detroit area hospitals allegedly have reduced competition by agreeing upon RN wages."

### Practical Tips For Conducting Wage Surveys

Any prudent human resources professional might be forgiven for thinking that wage surveys should be abandoned altogether as too risky. But wage surveys can still be a useful tool for human resources personnel as long as they are thoughtfully conducted. Here are some practical suggestions for protecting your organization from ant-trust liability.

1. Have salary surveys managed or conducted by a third party. This is a key precaution to help your organization avoid allegations of price-fixing.
2. Conduct salary surveys on an infrequent basis to avoid the appearance of collusion, including informal communications among employers.
3. Keep salary information exchanges to data exchanges only, as any accompanying discussions and recommendations create the appearance of improper motive.



4. Provide information as part of the data exchange that is 60 days old. Do not, under any circumstances, include information regarding projected or future pay rates.
5. Make the data available to those outside the group of participants. Of course, it might be reasonable to charge non-participants a fee for access to the information.
6. Aggregate the data so that rates cannot easily be associated with any individual survey participant, and make the surveys large enough to obscure the identity of any particular participant.

As courts will look at the overall size and nature of the market being surveyed, along with the "market power" of survey participants, surveys of larger and more generally competitive markets are less likely to support the inference of a conspiracy to fix wages. Courts are also more inclined to examine all of the facts and circumstances in assessing allegations of an illegal price-fixing conspiracy; no single factor is likely to decide the outcome in the event of litigation.

While salary surveys remain a helpful tool for any organization, it is recommended that employers seek legal guidance and maintain appropriate safeguards before participating in a salary survey.

For more information contact the author at [urban@laborlawyers.com](mailto:urban@laborlawyers.com) or 303.218.3650.

# Retaliation Claims Continue to Rise, Lead the Pack at the EEOC

By Karen Gieselman (Columbia)

From 1997 to 2008, race discrimination was the most frequently asserted claim by individuals filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC). Since 1997, race discrimination has been asserted in approximately 35% of all EEOC charges.

In 2009, a new leader emerged among claims as retaliation became the most frequently asserted claim by individuals in EEOC charges. In fact, 36% of all charges filed with the EEOC in 2009 included a claim of retaliation. The number represents an approximately 70% increase in retaliation claims over the last decade and underscores the German proverb, “[r]evenge converts a little right into a great wrong.”

## The Rules Regarding Retaliation

Federal laws, as well as many states’ laws, prohibit employers from taking an adverse action against an employee because the employee opposed an unlawful employment practice or policy, or otherwise engaged in protected activity. Generally, to assert a retaliation claim individuals must show three things: 1) they engaged in protected activity, such as testifying regarding discrimination or opposing an unlawful activity; 2) there was an adverse employment action (e.g. termination or denial of a raise); and 3) there is a connection between the protected activity and the adverse action.

In 2006, the U.S. Supreme Court lowered the standard that individuals must meet to win a retaliation claim under federal anti-discrimination laws. In particular, the Court determined that to assert a retaliation claim, an employee need only show that the employer took an action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Additionally, the standard for proving a causal connection is not high. For example, suspicious timing between the protected activity and the adverse employment action may be sufficient to allow employees their day in court.

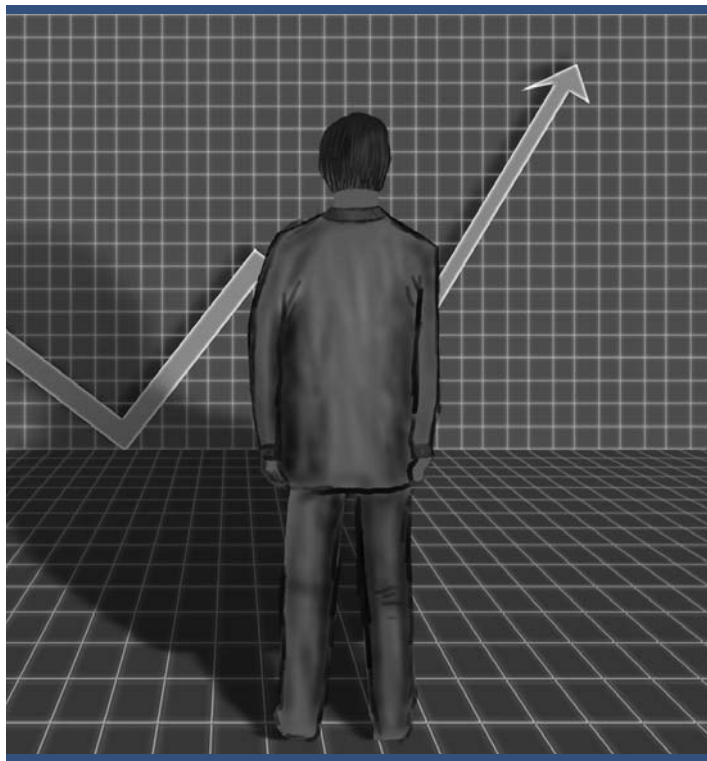
## The Reason for Rising Retaliation Claims

Retaliation claims are increasingly asserted both in charges of discrimination and in lawsuits. Why? It’s not attributable to an increase in vindictive, ruthless managers, but rather due to three factors. The first, is the change in the standard required to prove a retaliation claim under federal anti-discrimination legislation. The second, is an increased understanding by employees (and their attorneys) of the law regarding retaliation. The third, is human nature. Jurors often believe that it is understandable, even expected, for a manager or an employer to react or “strike back” at individuals who accused them of wrongdoing.

It’s easier for a juror to believe that a manager or supervisor changed his or her behavior towards a “squeal,” than it is for a juror to believe the same manager or supervisor discriminated against the same employee. As a result, an employee can often succeed on a retaliation claim even if the underlying complaint lacks merit.

## The Price of Revenge

The surge in retaliation claims has yielded claims that are tougher to defend and more expensive to resolve. A review of recent retaliation claims asserted against healthcare employers shows that retaliation claims can take a variety of forms. For example, in February, 2009, a Boston neurosurgeon was awarded \$1.6 million in damages by a federal



jury that found her employer and department chairman retaliated against her for complaining about discrimination, and violated a Massachusetts healthcare whistleblower law. As part of her claim, the neurosurgeon alleged that after she complained about discrimination, her employer retaliated by directing her to undergo a medical evaluation as a condition for renewing her credentials. The attorney for the neurosurgeon was able to obtain an order preventing the hospital from requiring the examination.

A Tennessee state court ruled in December, 2009, that a nurse had raised sufficient issues of disputed fact to allow her claim of retaliation to proceed to trial. The nurse alleged that she was subjected to harassment and the “cold shoulder treatment” after she expressed concern that a hospital policy which required nurses to dispense medication from a “mini-pharmacy” when a pharmacist was not on-duty forced the nurses to act outside the scope of their licenses. The hospital and nurse eventually agreed that the practice did not violate licensing requirements, but the court found that the nurse nonetheless had produced sufficient evidence that her employer violated her First Amendment rights by retaliating against her after she questioned the employer’s policy.

Finally, a federal court in Ohio ruled in February, 2010, that a hospital director raised sufficient evidence of unlawful discrimination and retaliation under the federal Americans with Disabilities Act and state civil rights laws. The director, who had been diagnosed with bipolar disorder, alleged that her medical condition made it difficult for her to concentrate and block out stimuli in her environment. To help her focus, the director worked with her door closed and, on occasions, worked a flexible schedule from home. For a period of eight years the director received satisfactory performance evaluations.

After a new supervisor took over leadership of the director’s department, the supervisor refused to allow the director to work from home and denied her request for flexible hours. The court determined that the employee raised sufficient evidence of retaliation for making the request to allow her case to be tried in front of a jury.

*Continued on page 4*

# Effective Documentation Speaks Volumes . . . And Protects Your Hospital

By Richele Keel Taylor (Columbia) and A. Kevin Troutman (Houston)

Document, document, document. Although this adage is second nature to human resources professionals, it is often not as important to front-line supervisors. Unfortunately, the key to maintaining an effective paper trail rests with those supervisors, who need to recognize what, when, and how to document. Shortcomings on these fronts can be as disastrous as having no documentation at all. Sometimes, it can even be worse. On the other hand, *effective* documentation can be invaluable when dealing with the EEOC or a lawsuit.

## “Kitchen-Sink” Lawsuit By Flex-Pool Nurse

A recent Tennessee case illustrates how good documentation helped a hospital defeat a kitchen-sink full of allegations by a former employee. *Counce v. Ascension Health*

Sandra Counce worked in Baptist Hospital’s nursing flex pool. She was not guaranteed hours or a scheduled shift, but was called to fill staffing shortages as needed. Without creating the appearance of an employment contract, the hospital documented this arrangement when it hired Counce. That documentation helped defeat her wage and hour claim.

Also, Counce received several performance evaluations during her orientation period. Though generally positive, the evaluations showed that the hospital discussed several aspects of her performance “in depth.” After a year of employment, the hospital initiated a formal performance management plan, to clearly document her specific performance issues and what she needed to do to improve. And it had Counce sign the documentation. She was terminated two months later for failing to meet her performance goals.

## Effective Paper Trail Defeats Nurse’s Claims

When Counce sued, the court found for the hospital because it had thoroughly and clearly documented its decisions, creating proof about its actions. Counce, on the other hand, produced no evidence (other than speculation) to support her allegations. This provided a solid record from which the appellate court affirmed the hospital’s victory. But even in this case, the court found it “troubling” that the hospital did not address Counce’s performance problems in more detail early-on. Ultimately, the performance improvement plan that she signed and the hospital’s timely follow-up saved the day.

Additionally, the hospital showed that during Counce’s internal grievance, the reviewing managers took the time to evaluate whether the termination was indeed justified. When Counce claimed that she had been

discriminated and retaliated against, the hospital documented that those allegations were new – she had never raised them during her performance reviews or to anyone else in management. The reviewing managers also asked Counce in writing for any supporting documentation or evidence in her possession. She produced none.

After a thorough review, the hospital determined that the termination was justified, based upon Counce’s poor job performance, especially as it affected patient care. Moreover, the hospital demonstrated that it took its grievance procedure seriously.

Of course, some of the documentation in this case could have been better – that’s almost always the case. Nevertheless, the hospital demonstrated consistency, sufficient attention to detail and a commitment to fairness, all of which proved to be important.

## Making Sure Your Documentation Is Effective

It’s not easy to create effective documentation. Supervisors are busy and may not feel comfortable confronting a problem. Then, when

the situation becomes intolerable, documentation is too often rushed, inadequate or barely done at all. Or, in an effort to expedite the process, the supervisor presents concerns that are vague or have gone stale.

To be effective, documentation must be timely. It must identify what the employee did wrong or needs to do differently. Needless to say, this description must be accurate and honest. Remember, documentation that is not honest may do more harm than good. For example, do not tell employees that their performance has improved unless it truly has. The documentation should describe what conduct or action the supervisor expects in the future, and the possible consequences of noncompliance. Finally, supervisors must follow up after addressing a problem. Silence looks like tacit approval of the employee’s performance, whether it has improved or not.

As the Counce case illustrates, taking the time to think through and complete these simple steps can make all the difference when litigation arises. Even though there may be two sides to every story, the side that wins is usually the one who can support its explanation with solid evidence. For employers, that evidence almost always takes the form of effective documentation.

For more information contact the authors: [rtaylor@laborlawyers.com](mailto:rtaylor@laborlawyers.com) and 803.255.0000, or [ktroutman@laborlawyers.com](mailto:ktroutman@laborlawyers.com) and 713.292.0150.



## Retaliation Claims Continue to Rise, Lead the Pack at the EEOC

Continued from page 2

### Preventing Retaliation Claims

Despite the rise in retaliation claims, there are several steps you can take to prevent retaliation claims, and better defend your company against claims:

#### *Develop a Policy*

The first step is adopting an anti-retaliation policy. The policy should state that retaliation is unlawful and violations could lead to disciplinary action, up to and including termination. Additionally, the policy should require employees to report claims of retaliation and establish a reporting structure similar to that used for discrimination or harassment complaints.

#### *Conduct Training*

The second step is conducting training. Supervisors and managers that understand the consequences of retaliation are more likely to self-regulate their behavior and be cognizant of how their response to a complaint could lead to a retaliation claim. And training should not be limited to supervisors and managers. Employees should be trained not only on the existence of the policy, but also the procedure for reporting a claim.

#### *Investigate Complaints*

An employee who files a complaint should be assured both by your policies and your actions that complaints are taken seriously and are investigated thoroughly. Document an employee's complaint, conduct a full investigation, and keep a record of the findings of the investigation. Conducting and documenting a comprehensive investigation will provide support for your contention that you took the employee's allegations seriously and handled them with care.

Regardless of the outcome of the investigation, advise the employee orally and in writing that retaliation is prohibited under company policy and any retaliatory behavior should be reported immediately.

#### *Maintain Confidentiality*

During and after an investigation into a complaint, keep an employee's complaint confidential.

Disclosure of the complaint to other employees, including supervisors and managers, should be limited to a "need-to-know" basis.

Failure to maintain confidentiality can support an employee's contention that the company did not take the complaint seriously. Additionally, ignorance is one of the best defenses to a retaliation claim.

In particular, an employer can defeat a claim of causation between protected activity and an adverse action by demonstrating that the supervisor or manager who took the adverse action lacked any knowledge of the complaint.

#### *Be Mindful of Perceptions*

An individual who engages in protected activity is not insulated from disciplinary action.

Rather, an employer has a right to require a complaining employee to meet its expectations, abide by the company's standard of conduct, and follow company policy. But remember that an adverse action that follows closely on the heels of a complaint or report by an employee could be perceived by the complaining employee, or other employees, as retaliatory due to the temporal proximity alone. Carefully evaluate not only the period of time between a complaint and proposed adverse action, but also the basis for the adverse action, to ensure there is no connection between the two.

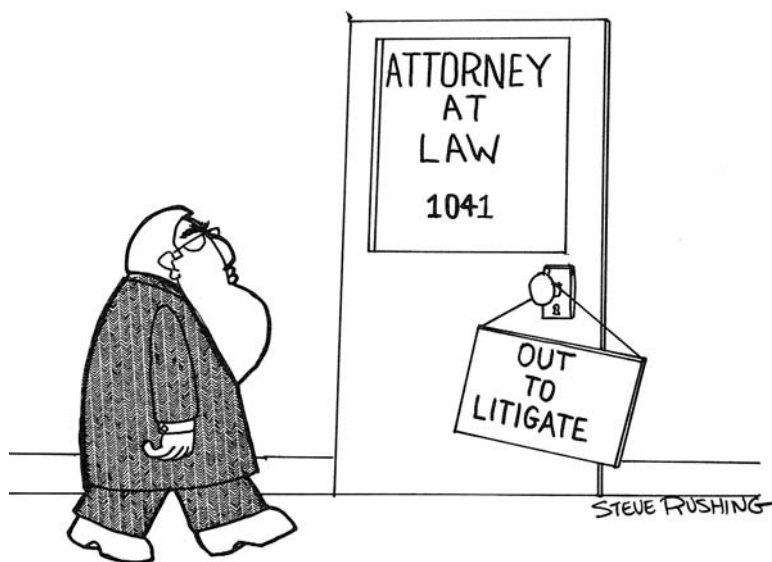
If discipline or counseling is warranted, be certain that performance deficiencies or the misconduct is documented and any action taken against a complaining employee is consistent with treatment of other employees.

For more information, contact the author at [kgieselman@laborlawyers.com](mailto:kgieselman@laborlawyers.com) or 803.255.0000.

The *Healthcare Update* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

### Office Locations

Atlanta phone 404.231.1400	Houston phone 713.292.0150	Orlando phone 407.541.0888
Charlotte phone 704.334.4565	Irvine phone 949.851.2424	Philadelphia phone 610.230.2150
Chicago phone 312.346.8061	Kansas City phone 816.842.8770	Phoenix phone 602.281.3400
Columbia phone 803.255.0000	Las Vegas phone 702.252.3131	Portland ME phone 207.774.6001
Dallas phone 214.220.9100	Louisville phone 502.561.3990	Portland OR phone 503.242.4262
Denver phone 303.218.3650	New Jersey phone 908.516.1050	San Diego phone 858.597.9600
Fort Lauderdale phone 954.525.4800	New Orleans phone 504.522.3303	San Francisco phone 415.490.9000
		Tampa phone 813.769.7500



Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters