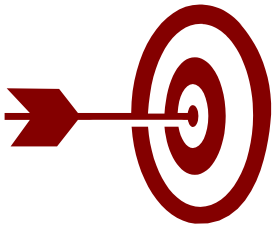


RETALIATION

WEBINAR PRESENTED BY

TENNESSEE HUMAN RIGHTS COMMISSION (THRC)

AND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

EEOC- THRC

Mission

- To Stop and Remedy Unlawful Employment Discrimination

Mission

- To Safeguard Individuals From Discrimination Through Enforcement and Education

EEOC- THRC

EEOC Jurisdiction	THRC Jurisdiction
Workplace discrimination based on: • Race • Color • National Origin • Gender • Religion • Age • Disability • Genetic Information	Workplace discrimination based on: • Race • Color • National Origin • Gender • Age • Religion/Creed (No Accommodation Issues • Disability (No Accommodation Issues)

EEOC- THRC

Employers subject to EEOC Jurisdiction

- Employers with 15 or more employees
- If age is alleged, employers must have 20 or more employees
- If the employer has fewer than 15 or 20 employees, the charge is automatically transferred to THRC

Employers subject to THRC Jurisdiction

- If you believe you have been discriminated against, you have a right to file a charge of discrimination.
- The employer must employ:
  - **8 or more employees**
  - **At least 1 employee for retaliation claims**
- THRC covers housing and public accommodation complaints.

EEOC- THRC

EEOC charges must be filed within:	THRC charges must be filed within:
• 300 days of the last discriminatory act unless it is a continuing violation.	• 180 days of the last discriminatory act unless it is a continuing violation. • If it is filed with THRC outside of 180 days but within EEOC's 300 day time frame the charge will be automatically transferred to EEOC.

EEOC- THRC

EEOC Notice to Employer:

- Within 10 days of filing the complaint EEOC will send notice to the employer that a complaint has been filed.
- However, EEOC may dismiss a charge without any further investigation if the charge is untimely or if the allegations do not support a violation of the law.

THRC Notice to Employer

- Within 10 days of filing the complaint, THRC will send notice to the employer that a complaint has been filed. The employer will receive the actual complaint form that was completed with the exception of the witness list.

EEOC- THRC

Mediation Opportunity

- Before we investigate your charge, EEOC and THRC will extend the opportunity to mediate. Mediation is voluntary and both parties must agree to meet face-to-face with a neutral third party in an attempt to settle the charge.
- If an agreement is reached during mediation, the charge will be closed.
- If unsuccessful, the investigative process will continue.

Why Should You Consider Mediation?

- Free
- Fair and Neutral
- Saves time and money
- Confidential
- Avoids litigation
- Fosters cooperation

- Improves communications
- Discovers real issues in the workplace
- Design your own solution
- Everyone Wins

EEOC- THRC

EEOC Right to Sue	THRC Right to Sue
• A Right to Sue (RTS) is issued by EEOC and is required before a complainant can file a private lawsuit in **federal court.** • It can be issued if more than 180 days have passed since filing the charge.	• No Right to Sue Required for THRC Cases Pursued in State Court • A complainant may file a private lawsuit in **state court** at any time. • If a private lawsuit is filed, THRC will stop investigating and administratively close the case.

Retaliation Provisions - Laws

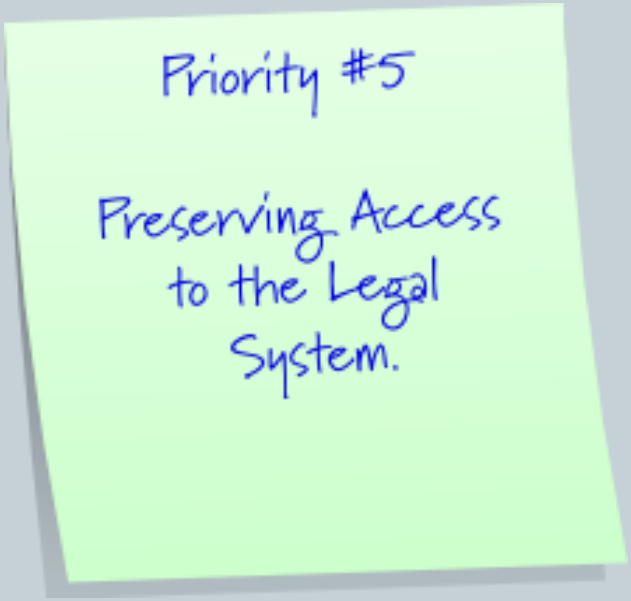
- All laws enforced by THRC and EEOC contain retaliation prohibitions:
  - **Tennessee Human Rights Act**
  - **Tennessee Disability Act**
  - **Title VII of the Civil Rights Act of 1964**
  - **Americans with Disabilities Act of 1990, as amended**
  - **Age Discrimination in Employment Act of 1967**
  - **Equal Pay Act of 1963**
  - **Genetic Information Nondiscrimination Act of 2008**

Retaliation

- Claims continue to be on the rise.
- Past ten years have nearly doubled.
- In 2010, for the first time in EEOC history became the most frequently filed charge and has remained in that position since.

Strategic Enforcement Plan

- Identifies six national enforcement and litigation priorities.



EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes.....

Retaliation

- Unlawful for an employer to take an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**.

Adverse Action

- Is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding, or because they opposed or participated.

Examples of Retaliatory Actions

- Discharge, discipline, demotion, reassignment
- Harassment and intimidation
- Denial of employment benefits
- Unjustified evaluations and reports
- Acceleration of disciplinary actions
- Negative reference of former employee
- Unwarranted contesting of unemployment claims
- Denial of right to oppose discrimination or participate in EEO process
- Any other action likely to deter a reasonable person from pursing their rights.

Covered Individual

- Has opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, disability or genetic information.

- Has a close association with a person who engaged in protected activity

Protected Activity

- Opposition to practice believed to be unlawful discrimination
  - **Informing an employer of believed discrimination**
    - Reasonable, good faith belief that practice violated anti-discrimination laws
    - Manner of opposition is reasonable
- Participation
  - **Filing a charge of discrimination or a lawsuit**
  - **Cooperating in an investigation of discrimination, including an employer investigation**
  - **Being a witness in an EEO investigation or litigation**

Causal Connection and Proof

- Individual must show a causal connection between the protected activity and the adverse employment action.
  - **Connection can be established through circumstantial evidence or direct evidence.**
  - **Temporal proximity (closeness in time)**
    - The closer in time the adverse action is to the protected activity, the better from the employee's perspective to prove that the two elements are related.
    - On the other hand, the longer the period of time is between the protected activity and the adverse action, the better it is for the employer to refute that the two elements are connected.

Comparators

- Definition:

  Comparators are individuals who can be used to compare their treatment versus the complainant's treatment;

  - **someone who's in a similar situation, but does not have the same protected characteristic;**
  - **everyone of any race, sex, etc., who did not oppose discrimination or participate in protected activity**

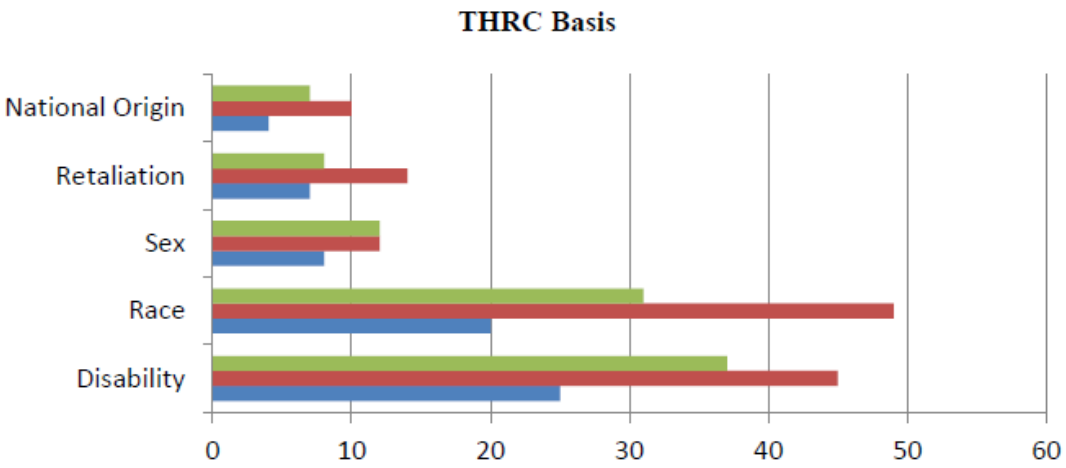
Policy vs. Practice

- Employers have policies
  - **Attendance, Discipline, etc.**

- In Retaliation cases it is often determined that a policy was not followed
  - **Accelerated discipline or discharge**
  - **Denial of leave**

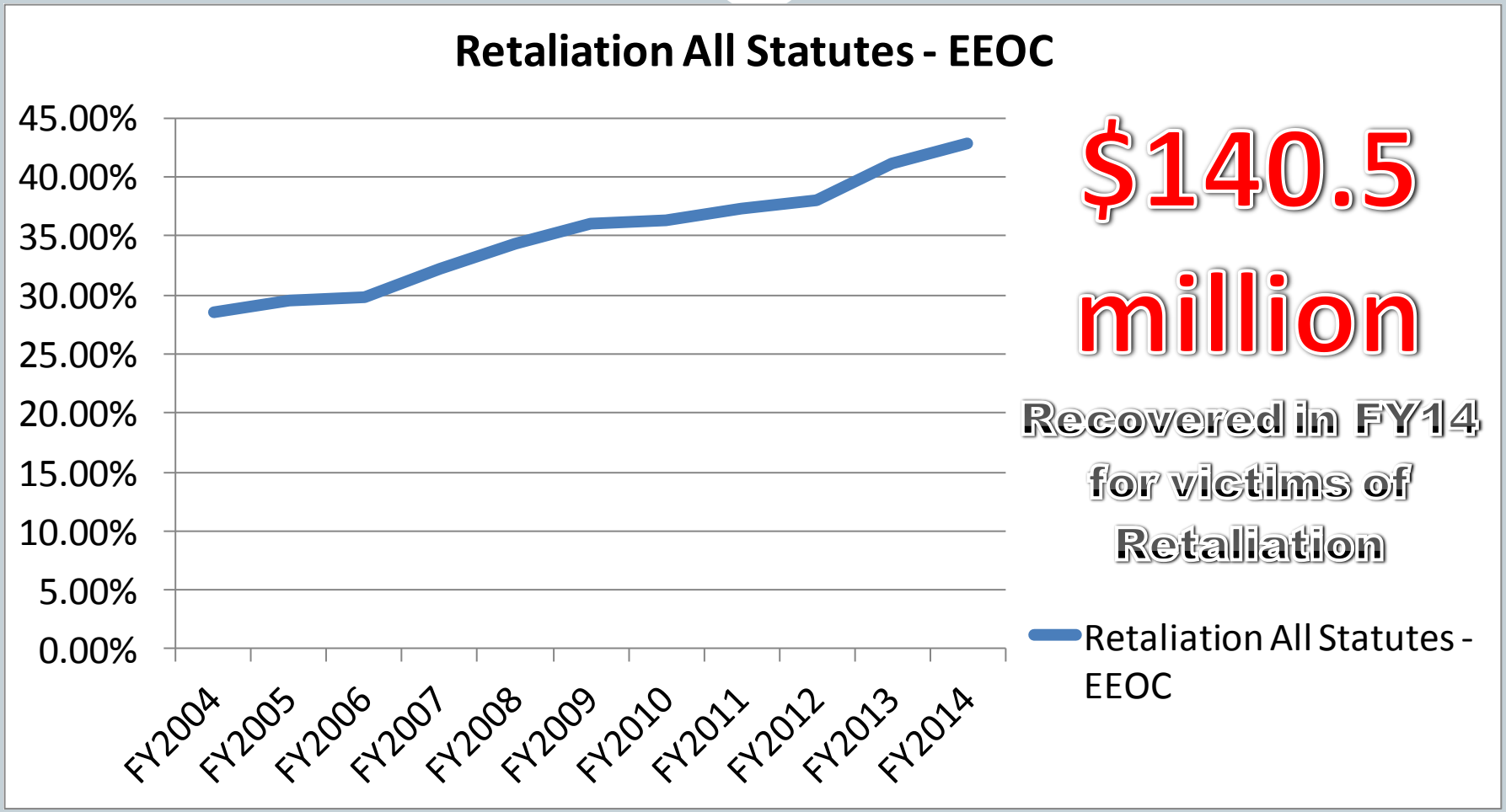
THRC Statistics

The top 5 basis for allegations for THRC for the last 3 fiscal years were disability, race, retaliation, sex and national origin. **Note:** Disability is the number one basis for fiscal year 2013-2014 for THRC. In some instances allegations may allege multiple bases.



	Disability	Race	Sex	Retaliation	National Origin
FY2013/2014	37	31	12	8	7
FY2012/2013	45	49	12	14	10
FY2011/2012	25	20	8	7	4

EEOC Statistics



$140.5 million

Recovered in FY14 for victims of Retaliation

Retaliation

- Most frequently filed charge with THRC and EEOC
- Oftentimes, an individual's initial charge filed has no merit but there is a red hot retaliation charge because of actions taken against them for filing a charge.
- Employers should have a good non-retaliation policy and regular training for their organization.

University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013)

University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013)

- **Nassar was on the faculty of UTSMC and on the staff of Parkland Hospital.**
- **Parkland had an agreement with UTSMC that available positions would be offered first to faculty at UTSMC.**
- **Nassar complained about his supervisor creating "religious, racial and cultural bias against Arabs and Muslims that resulted in a hostile work environment."**
- **He then quit his faculty job at UTSMC and contacted Parkland to possibly retain his staff position with the hospital.**
- **Chair of Internal Medicine at UTSMC contacted Parkland and reminded it of its agreement with UTSMC; thus, ending Nassar's employment with Parkland.**
  - *The evidence shows that the Chair of Internal Medicine was motivated, in part, by a desire to retaliate against Nassar because of his discrimination complaint*

THRC Retaliation Cases – Case 1

- An employee alleged discrimination based on race and retaliation.
- Employee began to notice, during their probationary period, company practices that were unethical, if not illegal.
- The employee complained to the manager who immediately became upset and told the employee it was not their concern.
- The employee complained to the next level supervisor.
- Shortly after this complaint, the employee began receiving write-ups and ultimately fired.

THRC Retaliation Cases – Case 2

- An employee filed a charge of sexual harassment and retaliation.
- Employee stated that a co-worker, over a period of time, continued to made sexual comments while at work.
- The employee complained to their immediate supervisor and up the chain of command.
- The employee was told that the co-worker was only *joking* and they should learn to ignore it and work together as a team.
- The employee continued to complain about the comments.
- The employee was written up for poor work performance, suspended and ultimately fired.

THRC Retaliation Cases-
Housing Case 1

- A mother of three filed a housing discrimination complaint against Cedar Rapids landlord Robert Miell alleging that he refused to rent her a three-bedroom apartment and unjustly charged her a higher security deposit because of her sex.
- HUD found no evidence of sex discrimination, but charged the landlord and management company in September 2009 with unlawfully retaliating against the tenant by terminating her lease and attempting to evict her because she filed a housing discrimination complaint.

EEOC Retaliation Cases – Case 1

- Three female sales persons at an auto dealership reported that they were subjected to sexual harassment by the Sales Manager. They were placed on a paid leave of absence for one week. After one week they were told the Sales Manager was fired when he failed to show up for a meeting about their allegations. The three salespersons were fired that day, allegedly for poor sales.

- EEOC filed a lawsuit and it was settled for
  - **$85,000 in monetary relief**
  - **2 year consent decree**
  - **Maintain written harassment and retaliation policies and ensure that all employees know about them**
  - **Required training on retaliation**
  - **Post a notice for 2 years stating that employer does not condone retaliation and provides EEOC's contact information**

EEOC Retaliation Cases – Case 2

- 2 employees, a maintenance mechanic and a human resources assistant, asserted that Hispanic employees were being treated more favorably than non-Hispanic employees. The maintenance mechanic was disciplined and discharged shortly after his complaints. The HR assistant was discharged shortly after her complaints.

- EEOC filed a lawsuit and it was settled for
  - **$92,500 in monetary relief**
  - **1 year consent decree**
  - **Required in-person training regarding retaliation to employees**
  - **Maintain records of any complaints of retaliation**
  - **Provide report to EEOC of any such complaints.**

Managers and Supervisors

- Understand that subordinates will complain about you.
- Do not take it personal.
- Do not get even.

Employer Best Practices

- Effective anti-retaliation policy.
- Train all of your Managers and Supervisors on the non-retaliation provisions of the law.
- Zero tolerance for retaliatory behavior.
- Communicate to employees that they are free to report discrimination
- Take all complaints of discrimination seriously.
- Investigate allegations promptly and timely.
- Follow up with employees who have used the complaint process.

Contact Information

- For Outreach & Education/Technical Assistance – EEOC
- Debra Finney, Outreach & Education Manager **debra.finney@eeoc.gov**

- For Outreach & Education- THRC
- Erica Kesse, Special Assistant to Director Beverly Watts **erica.kesse@tn.gov**