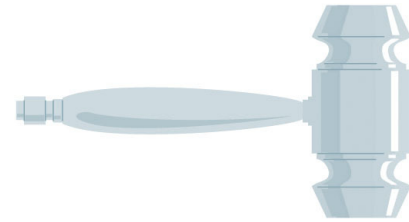


Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

The Principal's Role in Preventing Unlawful Retaliation — A Practical Guide



Consider this scenario:¹ Parents of a high school student come to you to complain that optional reading assigned by a history teacher is offensive to them and the student. The parents tell you that the suggested reading is a book that the teacher wrote and that the book contains sexual material. The parents tell you that the teacher is very pop-

ular with “the kids” and that they want you to keep their identities secret so as to prevent what the parents and student fear may be retaliation by the teacher and/or students. The parents refuse to put their complaint in writing as required by a school board policy on sexual harassment. However, they want you to take action to prevent the teacher from assigning his book and discussing the book in class, even though the book is optional and even though the teacher warned the students in advance that the book contains sexual content. What do you do, and how do you do it? What legal rules govern your conduct as the principal of the school and the person to whom a complaint was made? What rights does the teacher have? What rights do the student and her parents have? Does it matter that the parents refuse to put the complaint in writing and that they demand that their identity remain confidential?

A. Recognizing Protected Conduct

As a matter of law, the United States Constitution and numerous federal and state laws protect certain conduct (i.e., “protected conduct”) and prohibit retaliation against those who may engage in the protected conduct. The liability for unlawful retaliation can be as great as or greater than the liability for any other un-

lawful conduct.² There are a number of state and federal sources of anti-retaliation law, including the following:

- (1) The First Amendment Free Speech clause;³
- (2) The anti-retaliation provisions of Title VII;⁴
- (3) Title IX;⁵
- (4) Section 504;⁶
- (5) The Americans with Disabilities Act (“ADA”);⁷
- (6) The Age Discrimination in Employment Act (“ADEA”);⁸
- (7) The Fair Labor Standards Act (“FLSA”);⁹
- (8) The Pennsylvania Human Relations Act (“PHRA”);¹⁰ and
- (9) Pennsylvania’s Whistleblowers Act.¹¹

Principals must recognize when a student, employee or parent engages in protected conduct under any of these constitutional or statutory provisions and ensure that no retaliation takes place. Failure to recognize the protected activity or to ensure that no action is taken that might be seen as retaliation can result in significant personal liability for the principal or institutional liability for the school district.¹²

As can be seen from a perusal of all of the anti-retaliation provisions quoted in the footnotes to this article, the “protected activity” under each of the laws is similarly described and includes a broad array of conduct. It can be either a:

- (1) complaint about an allegedly unlawful act (i.e., opposition to an unlawful act);
- (2) speaking out against an unlawful act;
- (3) criticizing an unlawful act;
- (4) participating in an investigation of the unlawful act;
- (5) answering questions about an allegedly unlawful act;
- (6) writing a statement about the allegedly unlawful act;

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- (7) testifying as a witness in a proceeding under any of the laws referenced above; or
- (8) any other act or conduct that has opposed any unlawful practice or participated in any manner in an investigation, proceeding or litigation under any of the laws identified previously.

In the scenario that was described at the start of this article, the complaint by the parents was arguably protected activity that served to guard the parents and perhaps the student from unlawful retaliation.

B. Immediate Reactions to Protected Activity

Depending upon the nature of the protected activity in which the individual engages, the principal may be required to take immediate action. For example, if a student, parent or employee complains of sexual harassment, the school district is under the duty to promptly investigate the complaint and, if the complaint is substantiated, to promptly remedy the situation. It is my strong recommendation that the principal notify the appropriate central administrator of the complaint of sexual harassment and ensure that the central administrator conduct the investigation. It is also my strong recommendation that the school district's legal counsel be involved in the investigation and any necessary remedial actions.¹³

Protected activity, especially complaints of unlawful conduct, must be properly documented. The documentation includes a letter or memorandum to the complaining party. The letter or memorandum must contain:

- (1) the date of the complaint;
- (2) a detailed description of the complaint;
- (3) a request that the individual advise you if there are any errors or omissions as to the nature of the complaint;
- (4) the dates of the allegedly unlawful conduct;
- (5) a request that you be advised if any further inappropriate conduct or retaliation occurs;
- (6) a statement that unlawful conduct and retaliation will not be tolerated; and
- (7) reference to any applicable school board policy.

Finally, it must be remembered that certain allegations must be reported either to child welfare and/or to the police and district attorney in the county under the provisions of the Child Protective Services Act. Naturally, the principal must document that he/she took the necessary action to report such alleged conduct as required by law.

C. Protecting the Protected Individual

When it is recognized that a student, parent or employee has engaged in protected activity, it is important that the individual who engaged in the protected conduct be protected from unlawful retaliation. The retaliation can take many forms. For example, it can be in the form of formal action taken against the individual, such as demotion or suspension of an employee or the suspension of a student. In a case currently pending in the United States District

Court for the Eastern District of Pennsylvania, a charter school student is claiming that the school district's failure to allow him to participate in extracurricular activities constitutes unlawful retaliation. On the other hand, retaliation can be from others as may occur when students retaliate against a student by creating a hostile environment for the student.

There are simply too many situations that can be said to constitute retaliation for me to describe in this article. However, when the principal knows that an individual has engaged in protected activity, the principal should be vigilant to ensure that no one is retaliating against the individual, either formally or through the creation of a hostile environment. One of the ways to ensure that the protected individual is free from unlawful retaliation is to follow up with the individual on a regular basis to determine if anything untoward is happening. For example, asking a student how things are going. Calling a parent and stating that you were thinking of them and wanted to make sure everything is "OK" may be a good idea.

Documentation is critically important with respect to such follow up. After contacting a student, parent or employee to ensure that everything is "OK," a letter or memorandum should be sent confirming the contact and the information that was shared.

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D. Documenting the Reasons for the Actions Taken

It is not uncommon for individuals who engage in protected activity, such as an employee filing a discrimination charge with the Equal Employment Opportunity Commission (“EEOC”) to have employment or performance issues. Although employees who file discrimination charges with the EEOC are protected from “retaliation,” that does not mean that they have a license to perform their jobs poorly. Action can be taken to improve their performance or discipline them for any valid and legitimate reason -- the reason simply cannot be to punish them for filing a com-

plaint. Therefore, if action is going to be taken against an individual who has engaged in protected conduct under one or more of the anti-retaliation statutes, it is important to ensure that the non-retaliatory reasons for the action are well documented. Again, as stated previously, it is highly recommended that legal counsel be involved in these endeavors.

Conclusion

In short, recognizing protected activity and taking action to guard against retaliation is a necessary duty of a principal.

Endnotes

¹The scenario that is being presented is inspired by a case that was recently decided by a federal jury and in which the jury awarded \$325,000 to a student whose rights under the First Amendment and the Fourteenth Amended Equal Protection Clause were allegedly violated. However, nothing in this article should be interpreted as an assessment of what did or did not happen in that case or an assessment of the acts or omissions, or the propriety of those acts or omissions, of the school district or any employee of the school district in that case.

From my review of the facts in that case, there was no unlawful conduct and no basis, in my opinion, for an award. However, the alleged facts provide a structure for discussion of some “do’s” and “don’ts” when dealing with something as simple as a parent complaint that has the potential to blossom into a six figure judgment by a jury.

²As stated earlier, a federal jury recently awarded \$325,000 to a student for alleged retaliation by the school district and a teacher in violation of the First Amendment right to free speech. The jury found a violation of both the anti-retaliation requirements of the First Amendment and the Equal Protection Clause. The damages awarded by the jury were not apportioned between the two, so it is unclear how much was awarded due to the alleged First Amendment violations and how much was awarded due to alleged violations of the Equal Protection clause. Of the \$325,000 awarded to the plaintiff, \$200,000 was assessed against the school district, \$25,000 was assessed against the teacher and another \$100,000 was assessed in punitive damages against the teacher. At the time that this article was written, post-trial motions were pending before the court. However, this jury award illustrates the potential risks should a principal not guard against retaliatory conduct or perhaps even the appearance of retaliation.

³See, *Garcetti vs. Ceballos*, 547 U.S. 410 (2006)(public employees when speaking as employees have no First Amendment Free Speech protection); *Borough of Duryea vs. Cuanieri*, 131 S.Ct. 2488 (2011)(a public employee’s petition to government as an employee on a matter of purely private concern is not protected by the First Amendment).

⁴Title VII prohibits discrimination in employment with respect to race, gender, ethnicity and nationality. With regard to retaliation, Title VII provides that: “(a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.” 42 U.S.C.A. §2000e-3(a).

⁵Title IX prohibits gender discrimination by recipients of federal financial assistance. Title IX does not contain an anti-retaliation provision in the statute itself. However, in *Jackson vs. Birmingham Board of Education*, 544 U.S. 167 (2005), the United States Supreme Court ruled that retaliation against an individual who complains of unlawful sex or gender discrimination is a form of unlawful discrimination. Therefore, even though the statute itself does not contain an anti-retaliation provision, such a provision is implied.

⁶Section 504 prohibits discrimination on the basis of disability by recipients of federal financial assistance. Like Title IX, there are no statutory provisions expressly relating to anti-retaliation in Section 504. However, the Section 504 implementing regulations prohibit retaliation, providing: “No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part.” 34 C.F.R. §100.7.

⁷The ADA prohibits discrimination on the basis of disability in employment and with regard to public accommodations. The ADA provides that: “(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this chapter. (b) Interference, coercion or intimidation. It shall be unlawful to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.” 42 U.S.C.A. §12203.

⁸The ADEA prohibits age discrimination in employment. With respect to retaliation, the ADEA provides that: “(d) Opposition to unlawful practices; participation in investigations, proceedings or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under this chapter.” 29 U.S.C.A. §623(d).

⁹The FLSA governs minimum wages and hours. With regard to retaliation, the FLSA provides that: “[I]t shall be unlawful for any person— * * * (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . .” 29 U.S.C.A. §215(a).

¹⁰The PHRA is a broad based anti-discrimination statute. With regard to retaliation, the PHRA provides that: “It shall be an unlawful discriminatory practice, * * * (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.” 43 P.S. §955(d).

¹¹The Whistleblower Act provides that: “(a) Persons not to be discharged.—No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. (b) Discrimination prohibited.—No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.” 43 P.S. §1423.

¹²It is beyond the scope of this article to delve into the subtleties of all of the different laws that contain anti-discrimination provisions. For example, some laws allow suits only against the school district as an entity and do not provide for individual liability of the principal. For example, unlawful retaliation under Section 504 can be brought only against the school district and not against the principal. However, the same conduct is also a violation of the anti-retaliation provisions of the PHRA, and the principal can be sued in most instances under the PHRA.

¹³I consistently advise my clients of two rules of thumb for the retention of legal counsel. It is my strong opinion that legal counsel should be retained to assist the school district in personnel matters whenever: (1) there is a possibility of employee discipline that may involve a suspension without pay or dismissal; and (2) when failure to take proper action, such as a proper investigation of sexual harassment, may lead to legal liability.