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# TOP 5 REASONS RESTAURANTS GET SUED BY EMPLOYEES

A Prevention  
Plan

# TOP 5 REASONS RESTAURANTS GET SUED BY EMPLOYEES



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- Represents restaurants, hotels and  
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matters

# TOP 5 REASONS RESTAURANTS GET SUED BY EMPLOYEES

- 1. Wage-Hour Claims
- 2. Harassment Allegations
- 3. Retaliation & Whistleblower Suits
- 4. Dress & Appearance Issues
- 5. Social Media

# YOUR EMPLOYEES WILL SUE YOU FOR. . . .

1.

## VIOLATIONS OF THE FAIR LABOR STANDARDS ACT

# TIP CREDIT



- Customary and regular receipt of at least \$30/mo. in tips.
- Amount of Credit = \$5.12/hr
- Employer's Responsibility:
  - Make up difference if tips do not cover minimum wage
  - Establish the amount of tips paid

# TIP CREDIT



➤ *Required WRITTEN Notice:*

1. Cash wage amount
2. Tip credit amount
3. That tip credit claimed by employer cannot exceed the amount of tips received by tipped employee
4. That all tips are to be retained by employee except if there is a valid tip pooling arrangement
5. That the tip credit will not apply to any tipped employees who do not receive notice.

➤ Failure to provide notice = responsible for full minimum wage

# TIP POOLING



- Permissible *only IF*:
  - Must be among those who customarily and regularly receive tips.
    - Yes → wait staff, bartenders, counter personnel
    - No → cooks, dishwashers, janitors
    - Factor: customer interaction
- Management may not retain any tips for any purpose.

# TIP POOLING PROBLEMS

- *Matamoros v. Starbucks*, Case No. 12-1189 (1<sup>st</sup> Cir. 2012).
  - Shift supervisors and baristas participated in tip pool
  - Class of baristas claimed that shift supervisors should not have been included in the tip pool arrangements because they had managerial responsibility
  - Massachusetts' "Tips Act" defined "wait staff employee" as a person who had "no managerial responsibility."
  - Starbucks: Shift supervisors are hourly paid and 90% of the time perform work alongside baristas
  - Court: "No" managerial responsibility means "no." As in, "not any."
  - Result: Destruction of tip credit to the tune of \$14m





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2.  
HARASSMENT

# WHAT IS ILLEGAL HARASSMENT? ELEMENT ONE

- Harassment “because of” protected characteristic
- Personality conflict not enough
- Not just sexual; some other protected categories:
  - Race
  - Age
  - Disability/handicap
  - National origin
  - Citizenship status
  - Sexual orientation
  - Religion
  - Pregnancy
  - Service Member status

# WHAT IS ILLEGAL HARASSMENT? ELEMENT TWO

- The Conduct must be so severe or pervasive so as to alter the terms and conditions of one's employment
  - Sliding scale; the more severe it is, the less pervasive it needs to be (and vice versa)
  - It must be offensive, both subjectively and objectively
    - Subjectively → From the eyes of the "victim"
    - Objectively → From the eyes of the a reasonable person similarly-situated to the "victim" (e.g., a middle-aged female virgin)



# WHAT IS ILLEGAL HARASSMENT? ELEMENT THREE

- The Conduct was unwelcome to the alleged victim
  - Look to similar conduct by victim, signs of consent, and immediate reaction to conduct



# HARASSMENT IN RESTAURANTS

- *EEOC v. Carrols Restaurant Group, Inc.*, United States District Court, Southern District of New York
  - Case involving largest Burger King franchisee
  - Former Carrols worker files sex harassment charge with EEOC in 1998
  - Following investigation, EEOC files “pattern and practice” suit on behalf of current and former female employees
  - EEOC concludes that 511 female employees subjected to harassment; Carrols’ motions reduce number to 89
  - Settlement: Carrols announces last month that it will pay \$2.5 million to settle with 89 women, denying liability

# HARASSMENT IN RESTAURANTS

- *EEOC v. Merrill Pine Ridge, LLC, Merrill, WI*
  - Cook alleged to have made crude remarks to waitresses and grabbed their breasts
  - EEOC: Despite women's complaints, restaurant owner did nothing and fired some of the waitresses in retaliation for their complaints
  - EEOC and restaurant entered into Consent Decree: \$41,000 and mandatory training of restaurant owners, managers and employees



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3.

# RETALIATION AND WHISTLEBLOWER CLAIMS

# LAWS PROHIBITING RETALIATION

- ADEA
- ADA
- ERISA
- FLSA
- FMLA
- FCRA
- NLRA
- OSHA
- USERRA
- Title VII

And many more federal,  
state and local laws. . . .



## Flood of 'retaliation' cases surfacing in U.S. workplace

By Stephanie Armour  
and Barbara Hansen  
USA TODAY

In a growing workplace battleground, a record number of employees say they're being fired, demoted and otherwise punished for speaking out against discrimination or harassment.

Many are filing lawsuits or complaints against bosses for retaliating against them. Once a fairly rare problem, "retaliation" charges filed with the Equal Employment Opportunity Commission (EEOC) have more than doubled since 1991 — from 14,708 cases in fiscal 1991 to 31,059 last year. The surge is coming although the overall number of charges filed with the agency has declined since 1997.

Retaliation cases are potentially the most emotionally charged of any in the white-collar or blue-collar workplace. In many cases, the boss has subjected a subordinate to sexual harassment, racial

discrimination or other illegal activity.

After the worker objects, possibly filing charges with the EEOC, hiring a lawyer or complaining to the company's higher-ups, the boss or higher-ups retaliate, sometimes demoting, firing, or denying pay raises. The retribution often takes place furtively, behind closed doors and only becomes the talk of the workplace once legal action takes place.

While the cases can be difficult to prove, many of the victims are winning lawsuits. An analysis for USA TODAY by Jury Verdict Research shows that those who file retaliation lawsuits win a higher percentage of cases than victims of age, disability, race or sex discrimination.

And some awards are very large. A jury awarded \$81 million last year to Linda Channon, a former United Parcel Service manager who said she was shuffled from job to job after complaining of

### COVER STORY

Please see COVER STORY next page ►

# ADA AND RETALIATION

- *EEOC v. McCormick and Schmick's*, Civil Action No. 8:11-cv-02695, U.S. District Court for the District of Maryland
  - EEOC claimed deaf prep cook was harassed by former manager through mockery and threatening physical conduct
  - Employee was allegedly demoted to dishwasher because of disability and had prep cook duties removed
  - After complaining about disability discrimination, restaurant allegedly demoted him to janitorial-type position and cut his hours
  - Four months later, deaf employee was fired, according to EEOC in retaliation for making complaints
  - EEOC sued on employee's behalf, resulting in two-year consent decree and \$47,814 in monetary settlement

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4.  
DRESS & APPEARANCE  
ISSUES

# APPEARANCE DISCRIMINATION



- Four circumstances in which these issues arise in restaurants:
  - “You’re not attractive enough to work here”
  - “You’re too attractive to work here”
  - Tattoos, piercings and grooming standards
  - Religious dress, hair and related issues

# DISCRIMINATION BASED ON UNATTRACTIVENESS

- Only a few jurisdictions make it illegal:
  - District of Columbia
  - Santa Cruz, CA
  - Michigan (height and weight)
  - San Francisco (height and weight)

# DISCRIMINATION BASED ON UNATTRACTIVENESS

- Most challenges are based on other laws:
  - Americans with Disabilities Act
  - Title VII of Civil Rights Act of 1964
  - Age Discrimination in Employment Act
  - Analogous state laws



# RELIGIOUS DRESS AND GROOMING STANDARDS

- You may have to “reasonably accommodate” an employee who cannot conform to dress and grooming standards on account of religious belief.
- “Religious belief” is not limited to membership in major religions; sincerely-held moral or ethical beliefs may qualify too.



# EXAMPLES OF RELIGIOUS ACCOMMODATIONS

- Allowing employees to wear head scarves or yarmulkes
  - Allowing employee to wear a beard – unless legitimate safety concern is present
  - Allowing employees to wear religious jewelry (necklaces, pins) unless safety hazard is presented
- 
- *EEOC v. Abercrombie & Fitch Stores* (N.D. Okla. 2011) – employer violated Title VII by failing to hire Muslim applicant whose head scarf violated the store chain’s “Look Policy”



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5.  
SOCIAL MEDIA

# THE SINGING BARISTA

- A Starbucks barista posted a YouTube video singing a song in his green apron, complaining about the “annoying customers”
- In just 2 days, the video went “viral” and had more than 40,000 views and making national headlines
- Starbucks wasn’t laughing



# THE ANGRY WAITRESS



- A waitress at Chili's was left a \$5 tip on a \$138 bill. She expressed her anger by posting a status on Facebook threatening to "spit in [the customer's] food" if she ever came back
- The information on her Facebook page made it possible for concerned customers to find out which Chili's location she worked at, and to alert her managers

# WRAP UP

- Questions?

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