



**CONSTANGY**  
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# "Timing" is EVERYTHING!

By

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Hilton Sandestin Beach Resort and Spa

*A wider lens on workplace law*



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# AGENDA

- Temporal Proximity Evidence and Retaliation Claims
- Statutes of Limitations For Bringing Employment Claims
- Time Periods For Records Retention
- Timely Loss Notice Requirements

A wider lens on workplace law

# Temporal Proximity Evidence And Retaliation Claims



- Retaliation Claims Have Become Increasingly Common
  - Title VII
  - FCRA
  - ADA
  - FMLA
  - ADEA
  - Whistleblowing
  - Workers' Compensation
  - First Amendment Speech
  - FLSA



# Temporal Proximity Evidence And Retaliation Claims



## INGREDIENTS

- Engagement in Statutory Protection by Employee
- Adverse Action by Employer

Example: John Doe complains that he should be paid overtime because he is not “exempt.” Subsequently, John Doe is denied a promotion.



# Temporal Proximity Evidence And Retaliation Claims



## CAUSAL CONNECTION

- “Temporal Proximity” is merely the length of time between the protected conduct and the subsequent adverse job action.
- The closer in time between protected conduct and adverse consequence the more likely courts are to infer a causal relationship.
- Inverse is true



# Temporal Proximity Evidence And Retaliation Claims



## CAUSAL CONNECTION REQUIREMENT

- Generally, a plaintiff must demonstrate that he/she was victimized “because” he/she “opposed an unlawful employment practice, “or because he/she filed a claim or made a charge” or “participated in an investigation.”
- “But-For” causation
- Timing is circumstantial evidence of causation.



# Temporal Proximity Evidence And Retaliation Claims



## EXAMPLES

- Two weeks following filing of workers' compensation claim employee is terminated
- Employee requests FMLA leave and decision is announced to eliminate employee's position two months later
- Employee attends County Commission meeting and complains about mismanagement by Administrator—Administrator terminates employee following day



# Temporal Proximity Evidence And Retaliation Claims



## EXAMPLES (con't)

- Paramedic files lawsuit against County for FLSA overtime. Case is settled, resulting in back wage payment. 15 years later employee firefighter is refused opportunity to be tested for promotion.
- Employee is on leave of absence for 3 months due to workplace injury and exhausts FMLA leave. Employee is terminated.





# Temporal Proximity Evidence And Retaliation Claims



## What is appropriate time lag between protected conduct and adverse action

- No hard and fast rule
- Courts skeptical within 6 months
- Between 6 and 12 months — courts are more receptive to employer's argument
- 12 months or more — courts are more skeptical about employee's arguments



# Temporal Proximity Evidence And Retaliation Claims



## DEFENSES

- No proximity
- Documentation of legitimate business rationale predating adverse action
- Performance evaluation supports management's decision
- Review by objective observer/decision maker



# Temporal Proximity Evidence And Retaliation Claims



## PRACTICAL TIPS

- Know categories of potential retaliation claimants
- Have good reasons for taking adverse employment action
- Use someone other than targeted supervisor to take adverse action
- Don't know? Don't tell
- Document all plans/discipline
- Investigate all claims
- Recognize that nearness in time is key factor in retaliation claims



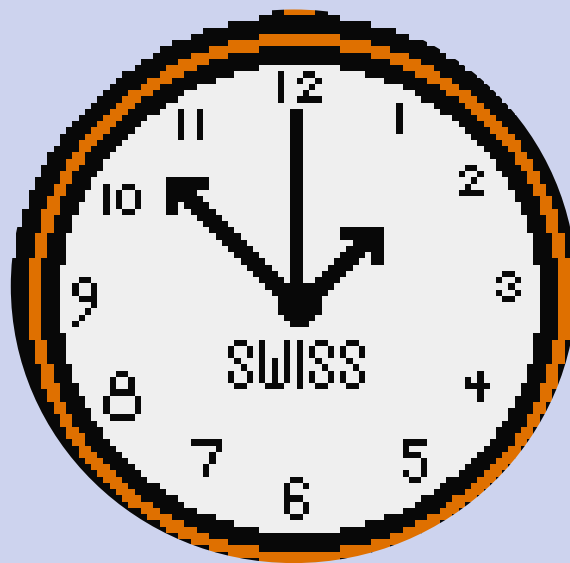
# Temporal Proximity Evidence And Retaliation Claims



## MORE PRACTICAL TIPS ABOUT TIMING

- Avoid taking adverse action when employee has personal tragedies taking place
- Consider the timing of adverse action in relation to holidays (e.g. Christmas or Thanksgiving)
- Consider timing of day/week when communicating adverse action





# Statutes of Limitations For Bringing Employment Claims



## GENERAL RULES FOR CHARGE FILING

- Title VII, ADEA and ADA EEOC charges – 300 days of occurrence of alleged unlawful practice
- Florida Civil Rights Act charges – 365 days of occurrence of alleged unlawful practice



# Statutes of Limitations For Bringing Employment Claims



## Filing Discrimination /EEO Retaliation Lawsuits After Charges are Determined by EEOC/FCHR

- Within 90 days from receipt of EEOC Right-to-Sue Notice from agency
- Special Rules where FCHR fails to make determination within 180 days of filing of charge



# Statutes of Limitations For Bringing Employment Claims



## Public Sector Whistleblowing Claims

- A lawsuit must be filed within 180 days of entry of final decision by County or within 180 days after adverse employment action
- If County has whistleblower procedures, must file claim pursuant to ordinance within 60 days after adverse action





# Statutes of Limitations For Bringing Employment Claims



## Workers' Compensation Retaliation

- An employee must bring a lawsuit within 4 years after personnel action



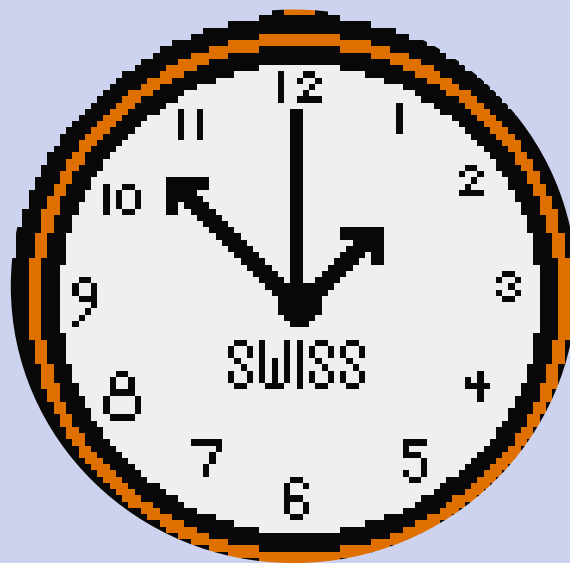
# Statutes of Limitations For Bringing Employment Claims



## Constitutional Retaliation Claims

- Section 1983 claims (e.g., First Amendment Speech Retaliation Claims) – within 4 years of adverse action



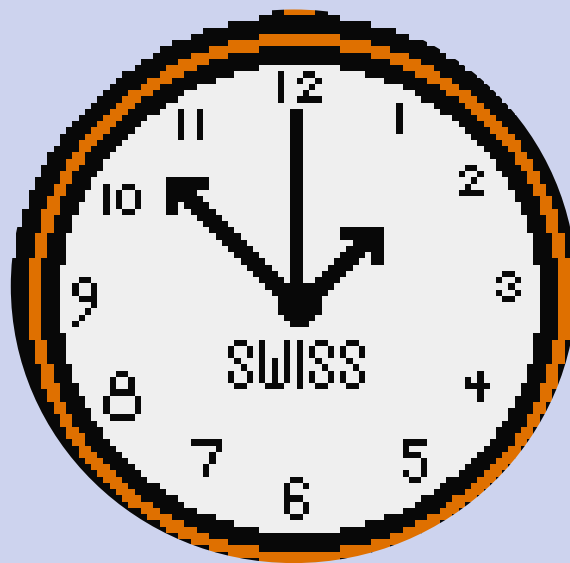


# Time Periods For Records Retention



- See Division of Library and Information Services GS 1-SL Records Retention Schedule
  - Personnel Records – 5 fiscal years
  - Employee Complaints – 1 anniversary year after resolved
  - Employee Discipline Records – 5 anniversary years after final action
  - Grievance Files – 3 fiscal years after settlement
  - Employee Conduct Counseling records – 1 anniversary year after final action
  - Application/Selection Records – 4 anniversary years after personnel action provided any litigation is resolved





# Timely Claim Notice Requirements Under FACT Program



In the event of an occurrence for which there is reasonable belief that a claim or suit for damages will arise, the Member shall act in accordance with the following, and all references to the Trust shall also include, by reference, the Trust's Service Company:

Give the Trust prompt written notice of any accident, occurrence or potential claim along with all relevant information concerning the claim.



# CONCLUSION



Post Hoc, Ergo Propter Hoc  
("after this, therefore because of this")

