

DATE: **2008 August 12**
PODCAST: **The Undercover Lawyer**
TITLE: **Episode 4: Retaliation at Work**

Welcome to the "Hostile Work Place" podcast episode four. I am your host, the Undercover Lawyer, otherwise know as Curt K. The "Hostile Work Place" podcast is a biweekly show where you can learn about all of the law that affects your rights at to work. Furthermore, you can learn how to fight back against the hostile workplace, against the bad boss, and know that your job is secure.

Throughout the hostile workplace episodes, I will reveal the tips & tricks and little known laws of the workplace that I have learned in over a decade of practicing employment law for big businesses, big companies inside a big firm. I bring that to you from "the other side." That is why I do this undercover, my goal is provide individuals with the very best legal knowledge and advice that is typically only available to large companies that can pay private firms like the one I worked for thousands of dollars, and here you are getting it for free.

There is more if you like what you find on the podcast ay my website which is www.undercoverlawyer.com. There are forums there where I will sometimes answer questions, and you can find people who have been through similar circumstances as you. Many people are very encouraged just to know that they are not alone in dealing with a bad boss everyday, someone who is a bully and makes you dread going into work each and every day. It is encouraging just to know that there are others that you can vent to and who understand what you are dealing with. You can find that at the forums, which is undercoverlawyer.com/forum/.

Now, for the announcements. You may have recalled last week where I went on a short diatribe about Michael "Savage" Weiner and his radio show wherein he basically defamed me and every other autism parent on the planet. I am unhappy to report that Savage is still on the air. I am happy to report that a number of stations have dropped him and a number of major advertisers have dropped him as well. I also went on a short diatribe about Stossel on 20/20 and him basically saying that age discrimination is bunked, and that employers should be allowed to "refresh and rebuild" by letting older workers go and hiring younger workers. I obviously think that that is also bunked and that Stossel has it all wrong. So many people who contact me are dealing with discrimination based on age, it is real problem in today's workplace.

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One interesting article I saw over the last week was one where there is an increase in incidents of bosses and supervisor and managers losing it at work, and supposedly this is because they are even under more pressure right now during our economic downturn, and it is causing them to lash out at those who they supervise. I do not think that is a particularly good excuse however. I mean does the dog deserved to be kicked when the father comes home? No.

I also mentioned last week our iPhone contest. We did have three winners, the winner of the iPhone post in the forum under the name of Solo, and she also won a copy of Work Laws Exposed. The number two placer was Little Lulu who wins an iPod Nano and a copy of the Bad Boss Folio. Since Lulu already had a copy of the Bad Boss Folio, she donated it to another user in the forums which is very kind of her. So props to Little Lulu. Our third place finisher was Central Use RN who will probably be featured prominently in the future podcast because of her compelling story at her workplace. So thank you to all three of those who really made the forums kick-off strong, along with others on the forum particularly Lori, Scrilla and Scoopster and HRWench. HRWench has her own blog that you might want to check out, and I will put a link to it in the show notes.

You may or may not have noticed that the Undercover Lawyer website went from non-existent on the web to pretty much a full-blown comprehensive employment law site in almost nothing flat. I thank all the people who have used it because they are the ones who have made that possible. Also, I want to give a special thank you to Sherry at EasyBlogHelp.com. She has some forums there where if you have a blog, you can post questions and get help with your blog issues. Then also, she is available for hire, to work on your blog if you have more complex problems. She is the one that I have used to get Undercover Lawyer up and running at a rapid rate. She does great work, and I can endorse her wholeheartedly if you have blog issues of your own. So, a special thank you to Sherry for making Undercover Lawyer possible.

Then one other announcement and link, that is Career Guide has mentioned Undercover Lawyer and the videos that are on the front page of my site in his blog.

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You can take a look at his article on violence in the workplace at his website which is CareerGuyd.blogspot.com. I will put a link to that in the show notes as well. Craig at CareerGuyd does have a really interesting article on violence in the workplace.

The final announcement is about the expansion of the website, taking it to the next level. We will be adding both transcripts of these podcasts so that if you want to read everything that is in there, you can. You can just read word for word what has been and there is no need to take notes. So, that will be another service that I will be offering.

Then I am going to be building up the state law resources section. So if you have a state that you would like me cover and provide resources, please let me know by posting on the forums page. The first people to post in there and the more people who say they want resources for that state, those are the states that I will start with. Let me know what kind of information you would like about your state. I have in mind what I think would be helpful, but I want to provide what you want and what you think would be helpful.

Now for our feature segment, which is on retaliation in the workplace, and this is a story that comes from my private practice where I defended a quick lube company. I do not want to name names, but when I want to make a peanut butter and jelly sandwich, I always use Jiffy Peanut Butter.

So here is what happened. Michelle was only the female worker at this quick lube location. As you might imagine, most of the workers there were male, they were about eight of them, and they were all in their 20's. The supervisor was male, he was in his early 30's. Michelle was a single mom, she was young, she was 20, and you could say all the guys treated her in a very non-discriminatory way. In other words, they treated her like she was just one of the guys. They joked with her about all kinds of very crude and sexually graphic things. The thing is, Michelle just played right along. She told jokes that were as, if not more, crude than them and was in every way one of the guys. She even kind of dressed like them.

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Now, the manager of the location whose name was Dan kind of had a brother-sister relationship with Michelle. There was no evidence that they ever had anything going on romantically between them, but he was the only other person there at the quick lube place who had children, so he kind of identified with them and wanted her to be able to be a good mom and get her on feet. She was going to school at night, trying to get to the next level, get a better job than working in a quick lube place and provide for her young son. So, she would have to take her son to daycare in the morning, and as a result she would often five or ten minutes late. Dan kind of looked out for her and would overlook that, be forgiving and understanding when that was the case. Then he also scheduled her to work shifts the same time as him, they enjoyed working together, got along well. That meant that she got mostly day shifts and mostly weekdays, which is the preferred shift to have.

So, all these went along just fine with these employees making and talking just very graphically about sex, oil, lubrication, pistons, cylinders and all kinds of innuendos, and then no so roundabout discussions. They would basically boast about what they did over the last weekend and make fun of anyone who did not do enough sexually over the weekend. That is kind of how their workplace went.

Evidently, even though Michelle has been participating in this, somewhere in the back of her head, she was not feeling good about it. But she was afraid to speak up. As you recall from previous episodes, if someone is going to complain about sexual harassment, they cannot sit on their hands, they have got to speak up. So, she just kept right on joking along with them. Then one day, someone said something that was just way over the top, just way too much for even Michelle to handle. She did speak up, finally, and said, "No, that is just more than I could take. That is way beyond the pail even for me. I cannot take that anymore, please stop this when I am around. I do not want to be a part of it anymore." So she felt good about that because she had finally had the courage to speak up and tell them how she felt about their sexual talk in the workplace.

Now, how did all these guys react when she basically raised her hand and said this is unwelcome behavior? As you might recall, that being a sign legally that she needed to

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make to those around her. This is unwelcome, and they need to respect that. What did they do? They kind of went, ha-ha and hit her on the shoulder, laughed and said, "You are funny, get over it," and acted like a bunch adolescent boys which they almost were. So this distressed her because she felt like she had done this thing she had been wanting to do for a long time, speak up and put a stop to this. When she finally did have the courage, she was blown off, and she was upset. The supervisor was there, Dan, when she had said this.

Frustrated, Michelle goes to the district manager who oversees a number of stores. Writes him a letter specifically about the graphic sexual talk going on at the workplace, how she asked the employees and the manager to stop this graphic sexual talk, and it did not. She was complaining and appealing to him, the district manager, to please put a stop to this kind of talk. The district manager was shocked and horrified knowing the kind of liability this could cause. So he came down on Dan like a ton of bricks and immediately put a stop to everything. In fact, the manager, Dan, very nearly lost his job. It turned out he was suspended for two weeks without pay, just as far as they could go short of firing him. The only reason he had not been fired is he had great reviews and there had never been any other complaints, his personnel file was sparkling clean. Even Michelle said she did not want him fired, she just wanted the behavior to stop. Remember, that they were friends, and she claims they were.

Well, how do you imagine Dan reacted when he heard that Michelle had, in his mind, tattled on him to the district manager causing him to be suspended for two weeks without pay? That is right, Dan was incensed at Michelle. He left like he had been absolutely betrayed by his friend, this person that he thought of as a sister, that he forgave when she was late because he was looking out for her being a single mom and make herself better in life and provide for her son. He has been her protector, and now here she is bringing the district manager down on him and nearly ruining his career. He just could not believe this, and he was outraged. Just incensed, betrayed sieving in anger toward Michelle.

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Well, what happened when he returned from two weeks of unpaid suspension and took the helm of the store again as the manager? Well, he did not want to talk to Michelle at all. He believed in his hearts of hearts that he had done nothing wrong, that all talk that had gone on was consensual, she participated right along. That if he had done anything that could be construed as sexual harassment, then she was misinterpreting what he has to say. So, what did he do? He just folded his arms across his chest, turned his nose in the air and said, "If she is not going to listen to what I have to say, if she is going to misinterpret everything that I say, I just would not say anything to her." That is what he did. It was kind of the junior high kind of girls fighting where Michelle comes in to the little office and Dan is there, Michelle asks Dan a question and Dan turns to the assistant manager, Mike, and says, "Mike, will you tell Michelle that she can discuss this with you outside of the office?" Just doing this childish thing where he will not acknowledge her presence or speak to her directly, even when she is standing right there in front of him. I mean just inane behavior.

Well, he did not want to work with her anymore because she might misinterpret anything he says. So, what does he do? He schedules her for nightshifts, weekend shifts. All the times that he is not working, he tries to schedule her. So not only does she get worst hours, but she also gets fewer hours. Now what about that coming in late because she is taking her son to daycare? Immediately, he starts making sure that whoever is the manager on duty writes Michelle up if she is even one minute late. She is given a warning, then a written warning, then put on a work plan and told that if she does not improve immediately she will be fired. If her attendance, timeliness does not improve, she will be fired. Remember, none of this happened before she turned him in to the district manager.

So, does this look like retaliation to you? To Dan, it does not. He thinks he is merely protecting himself from future sexual harassment claims because Michelle is going to misinterpret whatever he says. He is being overly sensitive. But that is how people respond when they are accused of taking jokes too far or sexual harassment that does not have to do with touching, often the accused reacts in this way. They are just

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horrified that they would be accused of something, and the other person is either a prude or is wildly misinterpreting what they have said before.

So to continue to our story, Michelle is working and she is been given a warning about being tardy, but she is still employed. She is inside the oil changing bay working with another few workers, changing the oil in the car. You know that they have various jobs, someone is down below the car, someone is on the computer terminal, someone is under the hood. Well, she was the person who was washing the windshield. So she has a squiggy and a spray bottle. Evidently it was cold, it was winter time, and because they put the bay doors up and down, they being the workers often wear what they call beanies, which is kind of like a ski cap, knit ski cap. They wear them down just right at their eyebrows in front. So she is joking around with the guy who is running the computer as she was washing the windshield of this Mercedes Benz, a new one. The guy who is behind the computer comes up behind her and lifts his arm up and then hits the back of her heard, knocking the front of her beanie cap down over her eyes. She has her squiggy and spins around trying to hit her co-worker with the squiggy misses, her keeps swinging, slams the metal squiggy into the new Mercedes Benz - big dent, big significant dent, scratched paint. Well, what happens then, the owner of the Mercedes Benz explodes out from the car. He was not going to leave that thing there without him watching it, wants Michelle's head on platter, wants her fired this moment, is enraged. They do suspend her, and they end up having to pay to fix the Mercedes. So, it is a significant loss for the company that she did cause.

Well, what happens from this? After being suspended, she is fired and then she sues for sexual harassment and retaliation. Her claim is that the real reason she was fired was retaliation for reporting her boss and former friend, Dan, to the district manager for the sexually hostile workplace. So, do you think that that is true? Well, here is the fact that decided the whole case.

The other guy who had been working there had been written up and investigated and interviewed. He had gotten a formal write-up in his file, and that was because he hit her on the back of the head and knocked the beanie cap in her eyes. In the company's view, she deserved the stronger more severe punishment because she is the one who

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dented the car and caused the monetary damage and enraged the customer. That seemed to fit, no problem. That is how we could explain the different levels of discipline for the two of them. It was due the different levels of damage they caused.

Well, when we interviewed or deposed this male worker who had hit her on the back of the head, we asked him which manager had spoken to him about this incident and interviewed him about it. He said, "I was never interviewed." When did you receive the write-up for this incident? He said, "I was never written up." Did you receive any kind of warning? "No." Did anyone talk to you in any way over this incident? "No, never." At this point, attorney's like to pull out a piece of paper that proves that someone had been talked and talked to. There was no piece of paper. We got a hold of this fellow's personnel file and there was no record that he was ever warned, that anyone ever talked to him, that he received any discipline of any kind because of this incident. So he received nothing, and she was terminated.

The disparity, the large disparity, the judge said, could have been motivated by the manager being angry toward Michelle and wanting her fired due to her turning him in for sexual harassment three months prior. That is how her retaliation claim went to a jury or it was going to go to a jury because it survived some re-judgment. In the end, the case settled. I cannot say I was really happy about settling that one. I argued long and hard that if you dent a Mercedes, that is cause to be fired no matter what. There is no need to go looking at any other facts, someone who does that at work deserves to be let go, period. But the judge disagreed, and she had a point. A jury could see that the two were handled differently because Michelle received the harsher treatment because of her complaint about Dan in the past.

So that case settled. We did not want to take it to a jury, we were afraid of what might happen. That particular employee got the equivalent of a little more than two year's wages for that settlement. So you can see how a company who wants to avoid rolling the dice at a jury will settle for a fairly significant sum, although it took Michelle all the way past some re-judgment. So, nearly a year before she saw a dime. She had to work that entire time and was supporting her son that entire time. For me, this is a mixed case because I was working on the defense side of it, but also because

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the retaliation was somewhat stretched in time from the event of her reporting Dan to the district manager.

One thing - and this is the quick tip for the week, which ties right in to our main story - is how much timing matters in establishing retaliation or some bad act in the workplace. In this instance, the judge said that three months was a short enough period of time between her turning Dan in and being terminated that we would assume that the two events were connected. Three to six months, they could be connected; over a year, then they are probably not; and six to a year, it is leaning toward no but it is not for sure, based only on the time.

So, let us say something bad has happened at work, some boss has acted in a horrible way or your business has done something that is potentially illegal. If you can report your boss or report your company before, and a short time before you believe that you might be disciplined or terminated or laid off, then the close proximity in time, what lawyers and courts call a tight nexts between the two events, that will help you establish that one was caused by the other. Meaning, the discipline or layoff was caused by you reporting the bad event, that supervisor at work, and you will be part of a protected class. Now there is not a 100% ironclad guarantee that you would not be disciplined or fired, but as you can see from what the judge said, the presumption will be that the two are connected, and the company will have to affirmatively disprove that the two were not. That is a very hard thing to do, to prove a negative. Lawyers just gnash their teeth and pull out their hair, trying to prove negatives. It is very frustrating, a very difficult thing.

Another lesson from this case is if you are a supervisor or a manager who happens to be listening to this or you see a supervisor or a manager get reported, here is what that person should do, they should treat the person who turned them in exactly the same as they treated them before the person turned them in. So, in this case, if Michelle and Dan worked the same schedule, similar hours, talked to one another, she reports him for not stopping sexual harassment, after that he should treat her exactly the same. Any difference in treatment can be taken as retaliation. So if Michelle were not to get training that the other workers got, that could be retaliation. If

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Michelle were to not as get many days of have her vacation disapproved while other workers got those things, that could be retaliation. Dan not talking to her could be retaliation - well, it is was. Him giving worst shifts, not promoting her, being more strict on tardiness than he has ever been before she turned him, any difference from before the turn in event and after the turn in event can be taken as retaliation.

So, if you are a manger, you need to treat the person exactly the same. If you think you are innocent and you are outraged, and I would be expect you to be outraged if you believe you are innocent, then you have to fake it. You have to act like nothing ever happened. Any negative behavior of yours toward the employee who turned you in will be construed as retaliation. If you are an employee, you can see how it is nearly impossible for managers to treat you exactly the same if you turn them in for some bad action. Why? Because they think they are innocent and they hate a person who accuses them. If you can put up with that from a manager, they will probably retaliate against you, and then you will have a retaliation claim. It is something where the court expects us to act in a way that is not natural. It is only natural to want to distance yourself from and stop talking to someone who accused you of something that you believe is untrue. It is only natural to do that, but courts expect management to act as if nothing ever happened or else it is retaliation. It is a strange rock and a hard place, a very difficult spot for managers to be in, and a savvy employee can use that to their own advantage to protect themselves at work.

That is the conclusion of this episode, episode four, of the "Hostile Work Place" podcast. If you have enjoyed the show and you are listening on iTunes, rather than give me a tip or use the little PayPal donation box that a lot of podcasters put up on the show notes, what I would really appreciate is if you would go to the show on iTunes, you can find it for searching for "Hostile Work Place" or search for Undercover Lawyer, then leave a positive comment about the show. That would be better than receiving a monetary tip, and it would help more people find the "Hostile Work Place" podcast so we can spread the word about the kind of bad things that employees have to put up with in today's workplace and strategies to help employees take back their workplace, get control of their life, and be able to look forward to going to work again.

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This is the Undercover Lawyer singing off. Thank you, and see you at the forums.

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