Take Steps to Prevent Retaliation Complaints from Employees

Become familiar with the issue, educate managers, and adopt prevention strategies

by Kathryn M. Vanden Berk

There's an increasingly prevalent trend within employment law that should be of particular concern to all employers: more employee lawsuits are being won on grounds of retaliation than for any other reason.

In plain English, retaliation is revenge. In employment law, it involves an employer taking an adverse action against an employee who has engaged in a legal activity—an activity that the law believes is in the public interest. Examples of protected activities include reporting a workplace violation to the U.S. Occupational Safety and Health Administration, testifying for a co-worker's unemployment claim, or filing a grievance with the organization's board of directors.

Termination is the most common form of retaliation. But, retaliation also can take the form of demotions, re-assignments, transfers to an unfavorable position or distant site, or turning a blind eye to ongoing harassment by co-workers or managers.

I suggest that employers become aware of retaliation employment laws and help their administrative and leadership teams learn how to deal with situations that, if not handled properly, might result in a charge of retaliation against the organization.

It's simply not worth taking action against an employee that you might consider a troublemaker, only to find that you face significant penalties under federal civil rights laws. Recently, it has become common for attorneys to advise their clients that they might win on a discrimination claim but lose on a retaliation claim if one has been tacked onto the lawsuit. If you have heard this advice, take it.

Broad Interpretation Favors Employees

A broad interpretation of retaliation was first articulated by the U.S. Supreme Court in a 2006 discrimination case filed against Burlington Northern Santa Fe Railway. In that decision, the Court ruled unanimously in favor of Sheila White, finding that two railroad supervisors were guilty of illegal retaliation against her based on the Civil Rights Act of 1964.[1]

The Burlington case began in 1997 when White reported sexual harassment committed by her supervisor. As a result of her complaints, she was suspended and transferred to a "dirtier" and "more strenuous" position. When she then filed sexual discrimination and retaliation complaints with the U.S. Equal Employment Opportunity Commission (EEOC), her new supervisor suspended her without pay on the grounds of insubordination.

Burlington's human resources department reviewed the situation and put her back to work. Given that she ultimately prevailed within the company's complaint system, one might wonder how White's claim could end up in front of the Supreme Court. Quite simply, the Court ruled that the Civil Rights Act's prohibition against retaliation[2] was broader than the employer claimed it was.

The Court also concluded that, even though White eventually was vindicated, her reassignment and suspensions constituted "adverse employment actions." The justices agreed that *any action* that may stifle an employee's exercise of the right to expose workplace harassment is forbidden by law.

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New Blog Provides Support for Workplace Issues

FEI Behavioral Health offers support for managers

A new blog from FEI Behavioral Health, an Alliance for Children and Families sister company, provides information and ideas for managers, supervisors, and human resources staff in both the nonprofit and for-profit sectors. The blog addresses a variety of workplace issues, including management styles, the importance of promoting a positive workplace culture, and compliance with the federal Americans with Disabilities Act.

Visit the blog at feinet.com/managerexchange. Learn more about FEI Behavioral Health at feinet.com.

Modern Day Application

Two Supreme Court decisions issued this year reinforced the ruling in the Burlington case. They came as a surprise to many Supreme Court observers, as the Court has decided many other recent decisions on the side of corporate America, and the facts surrounding these cases suggest that the decisions could have gone either way.

The first involved a female employee who filed a charge of sexual discrimination with the EEOC. Shortly thereafter, her fiancé, who also worked for the company, was fired. The Court determined the employer illegally retaliated, even though the fiancé was not the employee who filed the claim.

"We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired," the Court wrote.[3]

In the other case, a man filed several complaints indicating he was unfairly given the work of two people. He was terminated for taking photographs that proved his claim. As the action worked its way through the EEOC, the company gave conflicting reasons for his termination. These shifting justifications undermined the employer, especially since the last contention—that the man was terminated for violating a company policy—came close to conceding that retaliation had taken place.[4]

I suggest that nonprofit employers become familiar with the issue of retaliation and educate all of the organization's leaders and managers. To keep retaliation out of your organization:

Be Prepared. Create a tough anti-retaliation policy that includes the potential for terminating those who retaliate. Expand training about retaliation with your management and supervisory staff.

Be Proactive. Revisit your anti-retaliation policy after any complaints alleging wrongdoing on the part of your agency or staff. After an employee makes a complaint, conduct a thorough follow-up for several months to ensure retaliatory acts don't occur.

Be Protective. Conceal accusers' identities from the accused as long as possible during an investigation. Don't isolate, transfer, or otherwise change the duties of an employee who alleges wrongdoing without careful planning and the employee's involvement.

If you have good cause to terminate an employee and have documented the concerns that led to this decision, by all means, move forward. Just be cautious about timing. Although the EEOC understands that workers often file complaints as a way to protect themselves from being terminated, it doesn't hurt to let some time pass before dismissing the employee who filed the complaint—even if the decision is for good cause.

If, however, you are reacting to an employee who has just filed a complaint and you don't have good cause and clear documentation, stop right there. Don't put your organization at risk. ■

ENDNOTES:

1. See *Burlington Northern & Santa Fe Railway Co v. White* 548 U.S. 53 (2006).
2. Title VII of the Civil Rights Act of 1964 forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." A separate section of the Act—its anti-retaliation provision—forbids an employer from "discriminat(ing) against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. §2000e-3(a).
3. This opinion, in *Thompson v. North American Stainless LP* (No. 09-291), was issued Jan. 24, 2011.
4. See *Loudermilk v. Best Pallet Company LLC* (No. 08 C 6869, Feb. 18, 2011).

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