

# Take Steps to Prevent Retaliation Complaints from Employees

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

by Kathryn M. Vanden Berk

**T**here'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.<sup>1</sup>

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<sup>2</sup> 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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