Avoiding Employee Retaliation Claims

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The U.S. Equal Employment Opportunity Commission ("EEO") reports that the number of claims alleging unlawful retaliation has skyrocketed since 1997, from 22.7% to 41.1% of all claims filed. Retaliation is currently the most common basis for complaints filed with the agency, outdistancing both race (35.3%) and sex (29.5%) discrimination.

The expansion of retaliation claims is not limited to those falling within the EEOC’s jurisdiction. Legislatures and courts have significantly broadened the scope of persons protected against retaliation, lowered the burden for establishing claims, and expanded available damages. For example, the California Legislature recently expanded whistleblower retaliation protections, to protect employees from employers engaging in “unfair immigration-related practices” (AB 263) or threatening the immigration status of an employee’s family members (SB 666), among others.

Don’t Get Mad; Get Even

The legal structure of retaliation claims makes possible a much higher success rate for plaintiffs. In a typical employment discrimination case, plaintiffs must persuade a fact-finder that the manager involved in the adverse employment decision acted because of a bias against the plaintiff’s protected characteristic (e.g., race, gender, sexual orientation, etc.) Jurors may reject such a claim of discriminatory motive, but at the same time may accept the argument that the plaintiff experienced negative treatment – retaliation – after reporting or complaining of the discrimination or harassment.

The Protected Activity Issue

Another reason retaliation claims are easier to prove and win may be the legal elements of the claim. An employee must prove (1) a protected activity, (2) an adverse employment action, and (3) a causal connection between the protected activity and the adverse action.

Retaliation claims are unlike discrimination claims, and potentially are more dangerous, because the plaintiff need not establish that he or she the conduct opposed was actually unlawful. The plaintiff usually need establish only a “good faith, reasonable belief” that the employment action was unlawful.

Steps to Reduce Employer Exposure to Retaliation Claims

Employers seeking to reduce risk can and should take a number of preventive measures. An anti-retaliation policy is an obvious starting point. Employers with equal employment opportunity and
anti-harassment policies should ensure they specifically address retaliation protections. Anti-retaliation policies should address protected conduct that is unrelated to discrimination or harassment claims. Unlawful retaliation may occur when employees report, participate in investigations, or oppose issues that arise in workplace safety matters, wage-hour law, and securities fraud, for example.

A policy against retaliation is ineffective unless it includes ways for employees to safely raise concerns without retribution. Employers should implement open door policies, complaint hotlines, and other reporting procedures that ensure reports reach the right people, and that employees are protected from retribution.

Non-retaliation policies and complaint procedures are only as effective as the managers and supervisors who implement and apply them. Perhaps most importantly, senior management must recognize that it takes an act of courage to report suspected illegal conduct, and that employees who do are not necessarily intent on hurting the company. Employees who identify an issue may well provide an early warning of a problem that could get worse if it is not addressed.

Employers should train managers and supervisors that retaliation against employees who raise concern is unacceptable. Senior management must take retaliation seriously and take strong action against managers who take retribution against “whistleblowers.” Training should also include how to respond when a complaint is received. Employers should document all training sessions to show the steps taken to affirmatively prevent retaliatory conduct.

Human resources personnel should be instructed to explain the employer’s anti-retaliation policy, investigate such claims and offer to assist employees to ensure no further instances of retaliation occur. Employers should document any and all actions taken vis-à-vis retaliation complaints. Human resources or senior management should monitor employees who raise concerns to ensure they are not experiencing negative treatment.

In some situations an employer may need to consider restructuring the work environment to eliminate the risk of retaliation after a complaint is made (e.g., assigning an employee a different supervisor). If the employee must be transferred, employers must be careful to ensure that the transfer does not appear to be retaliatory. Explaining the situation to the employee and asking him or her to “sign off” on any transfer could be helpful in that regard.

Finally, there is a strong inference of retaliation when negative action quickly follows an employee’s protected conduct. Employers may hold employees who engage in protected activity to the same performance standards as anyone else. Problems occur when managers begin to enforce work rules more strictly after a complaint or when managers engage in “selective enforcement” of policies. Therefore, human resources management must scrutinize proposed actions against those who recently have engaged in protected conduct, and consider factors such as:

- Is the proposed disciplinary action consistent with the employer’s past practices when dealing with similar performance issues?
- Is the action supported by documentation?
- Is the employee being criticized for conduct that the employer previously considered acceptable prior to the complaint?
- Would an outside observer believe the action is reasonable?
- Would the employer’s “favorite employee” be treated the same?

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