Recent Trend in Retaliation Claims Leaves Employers Vulnerable to More Than Discrimination Suits

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The explosion in employment lawsuits over the last decade has left many employers wondering whether they can ever safely discipline or discharge an employee without getting sued. A recent trend in employment litigation exacerbates this concern: statistics from the Equal Employment Opportunity Commission show a rise in the number of retaliation claims from just 7,900 in 1991 to 19,691 in 1999. Retaliation claims are now the fastest growing type of charge at the EEOC, representing more than 1/4 of all charges in all categories. They are coupled with allegations of discriminatory discharge, as well as with claims of discrimination in the granting or denying of transfers, denial of promotions, assignment of job duties, and other employment actions, in both the federal and state courts.

In a number of recent cases, retaliation claims compounded already large monetary awards to successful plaintiffs. For example:

- A New Jersey jury returned a verdict for more than $220,000 in compensatory damage and $1 million in punitive damages for an employee who filed age discrimination and retaliation charges in connection with two missed promotions;
- A female disc jockey was awarded $1.25 million in punitive damages because she was subjected to intolerable working conditions in retaliation for filing a charge of pregnancy discrimination with the EEOC;
- A Texas jury awarded $10 million in punitive damages to five employees claiming they were retaliated against for filing workers' compensation claims; and,  
- A federal jury awarded a Connecticut state investigator $2.7 million after finding the attorney general's office retaliated against him for blowing the whistle on certain practices involved with joint state and federal investigations.

In 1998, the Equal Employment Opportunity Commission published a guidance for its investigators on how to process retaliation claims. Among other things, the guidance suggests that multiple retaliation claims may come from what turns out to be an unproven allegation of discrimination or from an investigation of employee conduct. Any employee — current, former, or prospective — may file a claim of retaliation, not just those who are members of the protected categories. It also advises that requests for accommodations for either religious practices or disabilities also are protected from a range of employer conduct, that may be considered retaliation, such as threats, reprimands, negative performance evaluations, harassment, and other adverse treatment that is reasonably likely to prevent the exercise of employee rights.

Avoiding Retaliation Claims

Consistent enforcement of human resource policies, especially those in place prior to any allegations of retaliatory action, will be effective in defeating a claim of retaliation. Once a complaint is made or after interviewing an employee as part of an internal investigation, management should reassure the employee that he or she will suffer no retaliation as a result. Below are some suggestions as to how to provide that reassurance.

1. Thank the employee for the information provided. Remind the employee of the company's commitment to equal employment opportunity, and let the employee know he or she has done...
2. Assure the employee that retaliation will not be tolerated. Review the company’s policy against retaliation with the employee. Ask the employee to report any further experiences or events resulting from the complaint or from participation in the investigation.

3. Put yourself in the employee’s shoes.

The employee may be more sensitive after lodging a complaint or participating in an investigation. Incidents of little consequence may appear retaliatory.

Despite these and other precautions, the timing of a disciplinary action or an unsatisfactory performance review may appear to support a claim of retaliation, especially if the underlying behavior has not been fully documented. In those instances, human resource professionals should confer with employment law counsel regarding the best way to proceed.
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