How to protect your business from workplace retaliation claims

Nicole Gray Interviewed by Smart Business Magazine

Workplace retaliation claims are an ever-increasing litigation concern for employers. In 2010 there were more charges of retaliation filed with the U.S. Equal Employment Opportunity Commission (EEOC) than any other type of charge.

“We are certainly seeing an uptick in retaliation claims filed by current and former employees,” says Nicole Gray, an attorney in the Labor and Employment Practice Group at McDonald Hopkins. “Recent decisions by the U.S. Supreme Court that have expanded the rights of employees who complain about retaliation, energetic enforcement by federal agencies, and increased public awareness are all factors that could explain why retaliation claims are becoming more frequent.”

In addition, almost every worker can relate to a story of disagreeing with a boss and falling into disfavor as a result.

“Courts and juries are more willing to accept an employee’s claim that he or she was treated differently after voicing complaints,” Gray adds.

Smart Business asked Gray how companies can proactively manage their work forces to defend against retaliation claims.

What does it mean that an employer ‘retaliated’ against an employee?

Put simply, retaliation law prohibits employers from ‘getting even’ with an employee who 1) engages in ‘protected conduct’ (e.g., files a lawsuit or administrative charge, testifies or participates in an investigation or hearing, promotes better working conditions), and/or 2) opposes an unlawful practice. This protection is not codified in any one statute, but is found in varying forms in laws that create workplace rights, such as employment discrimination laws, wage and hour laws, and leave and benefits laws — even the bankruptcy code and state wage garnishment laws include anti-retaliation provisions.

How does an employee establish a claim of retaliation?

There are three essential elements of a retaliation case: the employee engaged in protected activity of which the employer had knowledge; the employer took an adverse action against the employee; and a causal connection exists between the protected activity and the adverse action. An employee must only have a reasonable, good faith belief that the employer’s conduct is unlawful.

For example, an employee who believes in good faith that her employer was paying women less than their male counterparts may file a charge with an administrative agency. If the agency investigates and determines that discrimination did not occur, that employee still has the right to be free from reprisal for raising her complaint.

What types of ‘adverse actions’ give rise to a claim of retaliation?

While many claims are based on an employee termination, less severe actions against an employee may also give rise to a claim (e.g., a demotion, a disciplinary suspension, or denial of a promotion). Although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful.

Are only current employees able to allege workplace retaliation?

No. Adverse actions undertaken after the employee’s employment has ended, such as negative job references, can form the basis of a retaliation claim. In addition, third parties within the workplace, such as relatives or close associates, who did not complain of unlawful activity may be able to establish a retaliation claim if they suffered harm based on their association with the person who did complain.

If an employee engaged in protected conduct, does that mean he or she cannot be fired?

Employees who engage in protected conduct are not untouchable, nor excused from complying with work rules and/or achieving performance standards. It simply means that their employers cannot fire them (or take other tangible, adverse action against them) for engaging in that protected conduct. A court or investigative agency will review the facts to determine whether there is evidence that retaliation was a motive for the adverse action.

Temporal proximity is also a determinative factor in retaliation claims. Close temporal proximity between the employer's knowledge of the protected activity and the adverse employment action alone may be significant enough to constitute evidence of a causal connection. While there is no magic time period that necessarily insulates an employer from a retaliation claim, a recent decision out of Ohio's Eighth District Court of Appeals did hold that a one-year time period between the protected activity and the adverse action, without further evidence of retaliatory treatment, was too remote in time to establish a retaliation claim.

How can employers limit their exposure to a claim of workplace retaliation?

Be aware of employee rights and recognize that employer retaliation against protected employee conduct is unlawful. Likewise, consider whether an employee has engaged in protected activity prior to taking any adverse actions. Seek the assistance of legal counsel to identify potential retaliation issues, provide training to supervisors regarding prohibited activities, and update policies to include anti-retaliation language. Employers can rebut a retaliation claim if they are able to articulate a legitimate, nondiscriminatory reason for taking the adverse action. Therefore, employers should take care to ensure that they can establish an objective reason for the adverse action taken and, whenever possible, have effective documentation that supports that reason.

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