Employment Law IN Brief ™

Retaliation Claims Take Center Stage

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It is time for a brief refresher on retaliation claims. Consider:

- According to the EEOC, for fiscal year 2010, there were more retaliation charges than any other type of charge.

- Several years ago, the U.S. Supreme Court ruled that the anti-retaliation provisions of Title VII are not limited to actions that impact terms and conditions of employment. Rather, they prohibit any employer action that might dissuade a reasonable worker from making or supporting a claim of discrimination.

- In January 2011, the U.S. Supreme Court overruled the U.S. Court of Appeals for the Sixth Circuit and concluded that a former employee could bring a case of retaliation by alleging that his employer fired him to retaliate against his fiancée because of her complaints of sex discrimination (the fiancée also worked for the employer). The fact that the employer chose not to terminate the employee who actually complained of discrimination did not remove the case from the protections of Title VII's anti-retaliation provisions. Neither did the fact that the case was brought by the employee who was terminated rather than the fiancée to whom the alleged retaliation was directed. See, Thompson v. North American Stainless, LP, U.S. Supreme Court Case No. 09-291. This decision illustrates the broad coverage of the anti-retaliation provisions of federal discrimination law.

- In March 2011, the U.S. Supreme Court overruled the U.S. Court of Appeals for the Seventh Circuit (Indiana's circuit) and concluded that oral complaints are covered by the FLSA's anti-retaliation provisions as long as a reasonable employer would understand the complaint as an assertion of rights under the FLSA. See, Kasten v. Saint-Gobain Performance Plastics Corp., U.S. Supreme Court Case No. 09-834. This decision likely will result in more "He said-She said" cases under federal wage and hour law, an area of the law in which litigation already is exploding. "He said-She said" cases often require a trial so that a jury may evaluate credibility.

- It is getting increasingly difficult for employers to fully understand the risks of retaliation because a growing number of industry-specific statutes, the main focus of which is not employment, contain provisions that prohibit retaliation against employees for reporting misconduct to governmental entities responsible

for overseeing the industry in question. Human Resources now must have command not only of the vast number of general employment laws, but also laws specific to their industry.

- The prohibition against retaliation generally covers former employees. Consider establishing a reference protocol that centralizes references in a single department, like Human Resources, rather than authorizes individual managers and supervisors to give their own references, including on-line references.

- It is not uncommon for employers to successfully defend underlying claims of discrimination, harassment, failure to pay overtime, or other violations of applicable law, and lose a retaliation claim filed by the person who made the complaint of wrongdoing. Supervisors and managers should be reminded that the complaining employee does not have to be right (i.e., that a violation of the law occurred) to be protected. The employee simply needs to raise the concern in good faith.

- Retaliation claims are particularly challenging for employers because they are not as well-suited as other types of claims for resolution by a judge without the need for a trial. Retaliation claims often involve suspect timing and other facts that lead judges to conclude a jury should decide the matter based on credibility of witnesses.

Practice Tips:

- Train supervisors and managers to have "thick skin." Chances are good that they will be accused of improper behavior at some point in their management career. Getting back at the employee for making the complaint is not the solution. Even subtle attempts to make an employee's life miserable are easily revealed through the litigation process. Focus not on the complaint, but on the employee's job performance and conduct. Every decision to discipline an employee, change assignments, or give a poor evaluation should be supported by non-discriminatory and non-retaliatory reasons that are easy to articulate and support.

- When a supervisor or manager comes to you with a recommendation of termination, get as much information as you can from that person, and review all of the documentation relating to the recommendation. Consider comments, timing, etc. for any indication of retaliation.

- Before making a decision, get the employee's side of the story. If the employee alleges any type of retaliation, get as many facts as you can. Put the process of termination on hold. Consider suspending the employee while you investigate.

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- Try to determine whether the supervisor or manager's recommendation of termination is motivated in whole or in part by retaliation. If it is, try to determine whether there is an independent justification for termination. If there is not, consider an alternative to termination.

- This is yet another area for supervisor and manager training. Even though most supervisors and managers do not have the authority to make termination decisions, their actions clearly matter when it comes to liability for termination decisions based on their recommendations. Supervisors and managers ARE the employer. Their actions ARE the employer's actions. The must be trained in the basics of employment law.

If our labor and employment attorneys can be of assistance in training your managers and supervisors, please let us know.

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