Retaliation claims by fired employees on the rise

Protect your company from costly accusations

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Employers routinely take into consideration the potential for discrimination-based lawsuits when making the decision to discipline or terminate an employee. Lawsuits regarding protected characteristics, such as race, sex and age, have been common for decades. However, employers sometimes overlook one of the most common claims included in a lawsuit against an employer from a recently terminated employee: Retaliation.

According to the Equal Employment Opportunity Commission, the federal agency tasked with remedying employment-based discrimination, 36 percent of all EEOC charges in 2009 included a retaliation component. Also according to the EEOC, the percentage of EEOC charges alleging retaliation has increased in every reported year since 1992. For your company to avoid adding to the EEOC statistics, you must understand what a retaliation claim is and learn how to put your company in the best position to avoid such a claim.

Prohibitions against retaliation are included in most federal employee-related statutes and in several Ohio state statutes. Among others, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Ohio Fair Employment Practices Act and Ohio's workers' compensation law all have provisions that prohibit adverse treatment against those who oppose a practice made unlawful by the underlying statute or who exercise a right under one of the statutes.

It is important to note that an employer need not actually violate one of the acts for a retaliation claim to arise. As an example, assume a Caucasian employee, Sue, makes an internal complaint to a Caucasian human resource manager alleging that the employees' Caucasian supervisor engaged in race discrimination against Sue's coworker Jane, who is African-American. In response to the complaint, the company investigates the behavior of the supervisor and finds, correctly, that no discrimination occurred against Jane. The following week, Sue is selected by the human resource manager and the supervisor for a layoff. Under this set of facts, no underlying discrimination occurred. However, Sue is in a position to make a claim of retaliation, i.e., she engaged in protected activity (in this case, complaining about what she believed to be race discrimination) and suffered an adverse employment action (her layoff). While the company will have an opportunity to prove that Sue was selected for the layoff for legitimate business reasons, Sue has enough to make a prima facie case of retaliation.

In cases like these, courts look to several factors to determine whether an employer retaliated against an employee. In the absence of a smoking gun, which is rare, courts will look at several issues, including:

➤ How close in time was the adverse action to the protected activity? Courts have "inferred" that adverse action was caused by the protected activity when the adverse action took place shortly after the protected activity.

➤ Did the employer depart from normal procedures? This could take the form of a departure from normal procedures during either the initial investigation into the complaint or during the discipline or termination process.

➤ Did the employer treat the employee who engaged in protected activity differently than other employees? "Disparate treatment" is a red flag in most types of employment cases.

➤ Did the employer provide a false or inconsistent reason for the adverse action? This comes up most often when an employer attempts to spare the feeling of an employee by calling a performance-based decision a "layoff."

In addition to following normal procedures and making certain that similarly situated employees are treated consistently, there are other steps an employer can take to protect the company from retaliation claims. Specifically, employers should:

1. Expressly prohibit any form of retaliation both inside and outside the workplace through written employment policies and procedures. These policies should extend to nonwork activities and should be broad enough to cover all

types of retaliation and not just termination. These policies also should require employees to report any instance or perceived instance of retaliation.

2. Promptly respond to employee complaints. By promptly and properly responding to employee complaints, your company will create an environment in which retaliation is far from an employee's mind.

3. Train all employees on the topic of retaliation. In addition, employees should receive specific training regarding harassment, discrimination and the grievance and reporting procedures associated with all types of complaints.

4. Keep accurate and complete records of discipline and employee complaints. Records will help an employer prove the legitimate business reason for an adverse action and will help demonstrate to a judge or jury that the employer takes complaints seriously.

While the increase in retaliation complaints is troubling to employers, steps can be taken to protect your company from the costs associated with defending a retaliation complaint.

With respect to most employers, the foundation for successfully handling a retaliation complaint likely is already in place. However, given the number of retaliation cases in the courts, a prudent employer should make certain that it is doing everything in its power to reinforce its commitment to providing a retaliation-free workplace.

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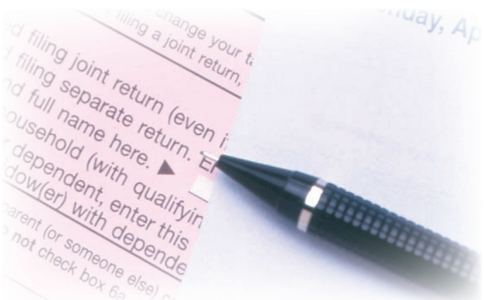

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