

## Avoiding Retaliation Claims In 4 Easy Steps

By **Ben James**

*Law360, New York (April 07, 2010)* -- How to deal with an employee who has brought a formal complaint but whose work is genuinely subpar is a delicate quandary for businesses. There's no cookie-cutter solution, but attorneys say there are steps employers can take to help shield them from retaliation claims.

U.S. Equal Employment Opportunity Commission statistics show that retaliation claims have been on the rise for the past decade. In the 2009 fiscal year there were 33,613 retaliation charges filed with the EEOC — up from 18,198 in 1997 — which accounted for 36 percent of all charges filed last year.

The surge in claims, according to attorneys, can be attributed to a growing understanding among workers of their rights, and the U.S. Supreme Court's 2006 ruling in *Burlington Northern Santa Fe Railroad Co. v. White*, which lowered the threshold for action that rises to the level of retaliation in breach of Title VII, holding that conduct short of termination could potentially be considered retaliation.

Retaliation claims have gotten tougher to defend, too, and settlement values have risen over the past 10 years, said Lisa Combs Jern, chair of the labor and employment practice at Sutherland Asbill & Brennan LLP.

But employers should not feel that their hands are tied when considering disciplinary action against a worker who has engaged in arguably protected activity, Jern said.

"I'm a firm believer in not letting threat of litigation dictate how you run your business," she said.

Here are four steps that employers can take to protect themselves from allegations of retaliation:

### **1. Take the initial complaint seriously.**

When a worker complains about alleged discrimination or harassment on the job, the worker's employer should do a full and complete investigation, documenting not only its findings but also its efforts to get to the bottom of the problem, said Jackson Lewis LLP partner Joan Ackerstein.

That approach will show employees that their concerns aren't being blown off, and it can provide employers with evidence showing that the complaint has been taken seriously, Ackerstein noted.

"Then the employer doesn't look defensive later," she said.

Jern said employers should also designate a point-person for complaining employees to go to if they have concerns about their treatment after they've made a complaint.

Not only will workers have an avenue for airing grievances, but failing to avail themselves of the avenue could prove a major blow to any retaliation claim they might later assert in court, Jern said.

Employers should also ensure that they keep a worker's initial complaint confidential, Jern said, because confidentiality can kill causation.

Co-workers who aren't aware that a complaint has been made may be obnoxious, but their behavior can't be considered retaliatory, she explained.

"If the person who is picking on the employee doesn't know a complaint has been made, that can't be retaliation," Jern said.

## **2. Beware of temporal proximity.**

If a worker is fired or demoted soon after voicing a complaint, courts and juries can get suspicious about the timing, attorneys say.

Courts have held that temporal proximity between a complaint and discipline can be enough to defeat an employer's summary judgment bid, making it imperative that employers scrutinize the time period between a worker's initial complaint and a disciplinary measure to be certain there's no relationship between the two, Ackerstein said.

While there is no set amount of time after which an employer becomes immune from a retaliation claim, "the more time [that passes], the more difficult it is for the employee," she said.

That is not to say, however, that employees who have lodged a recent complaint have a free pass to act out at work, she added.

If an employee complains on Wednesday and attacks a co-worker on Friday, the employer may freely terminate that employee without heed to how much time has passed, Ackerstein said. If, on the other hand, an employee is fired because he shows up five minutes late to work on the morning after making a complaint, that's a different story, she added.

## **3. Give the employee a chance to shape up.**

Before taking any adverse action based on performance issues, employers should have documentation that backs up their decision, attorneys said. In addition, warning employees about performance issues and offering them an opportunity to improve is a smart move.

Letting employees know about performance or attendance problems long before a disciplinary measure is even entertained is a good practice, and so is alerting employees to problems when they make a complaint, said Cooley Godward Kronish LLP partner Elizabeth Lewis.

If performance problems have been an issue prior to an employee raising a complaint, the employer should let the worker know that although there is no tolerance for retaliation, the worker is still responsible for poor performance, and that the performance issues will be managed separately from the investigation of the worker's complaint, Lewis said.

Complaining workers, Jern noted, should be told that they are still expected to do a good job.

#### **4. Keep managers well-trained.**

Many training programs have yet to catch up with the increase in retaliation claims and fail to give retaliation a focus commensurate with the increased prevalence in retaliation charges, said Shanti Atkins, CEO of workplace training firm ELT Inc.

While there's a lot of good awareness training aimed at discrimination and harassment, retaliation can get short shrift, Atkins said.

"The most common reason for successful retaliation claims is that the frontline managers that engage in the retaliatory behavior don't understand what they're doing," said Atkins, who added that managers often don't realize that a retaliation claim can be successful even if the underlying complaint lacks merit.

The bottom line is that it's human nature to respond to an accusation that's perceived as unfair, Atkins said.

Lewis said that though retaliation had always been part of companies' training programs, a better job could be done of making managers aware of exactly what constituted retaliation. Good management techniques are a crucial component of avoiding retaliation claims, Lewis said.

Despite all the different types of training companies do, there's a lack of training aimed at showing managers how to handle other employees, Lewis said, adding that people are often promoted to managerial roles because of capabilities that don't relate to overseeing others.

"There's not enough general training of managers on how to manage," she said.