

Retaliation Claims Shouldn't Be a Form of Job Security

Working Together

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I recently overheard a plaintiff's employment lawyer quip that the best form of job security for an employee is to file a retaliation claim. While there may be some plausibility to that, it is certainly not a truism. There is no question that an employer should be extremely cautious when disciplining employees who have filed complaints against it. This, however, does not mean that the employee is immune from disciplinary action.

Retaliation claims generally have three significant components: (1) protected activity; (2) adverse employment action; and (3) a causal connection between the two. The typical scenario is that an employee engages in what he believes to be a protected activity, and then alleges that the employer took adverse action against him for doing so. The scope of what can constitute a "protected activity" under the eyes of the law is a broad one, and can range from complaining about alleged discrimination against oneself or others, to "whistleblowing" and to requesting a reasonable accommodation based on religion or disability. The "adverse action" imposed on the employee can run the gamut from termination to a change in work hours. After the employee files his retaliation claim, many employers tend to treat the employee with kid gloves and are wary of taking any disciplinary action against the employee for fear of giving the employee additional fodder for his/her retaliation claim. Hence, the notion that filing a claim against your employer provides an employee with added job security.

Although employers should be cautious when dealing with employees who have filed claims against the company, they should not take a hands-off approach in taking disciplinary measures against such employees. There are several best practices that employers should keep in mind.

- **Ensure that the discipline is consistent and can be defended on an objective basis.** For example, if an employee routinely reported to work five minutes late and made up that time on the back-end with no previous objection from the employer, it would not be viewed favorably if the employer suddenly began writing the employee up for this conduct after he or she filed a complaint against it. On the other hand, if the employee's poor job performance is such that he/she is failing to satisfactorily perform the material functions of the job, or if other employees have been previously so disciplined for similar conduct, then such discipline should be effectively imposed and documented.
- **Consult with a human resources manager or a lawyer before imposing the discipline.** It is not uncommon for a direct supervisor to be too close to the situation, and therefore it behooves the employer to meet and confer before imposing discipline. One benefit of doing so is that you will often get an objective

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view as to whether the proposed discipline is warranted or justified.

- **Continue to follow all of your policies and procedures, especially the employer's Anti-Retaliation Policy.** It is imperative that employers have an anti-retaliation policy in place and that they abide by it. The anti-retaliation policy should not be a simple self-serving statement that "retaliation is illegal." Instead, the policy should be informative, actively implemented and refreshed through training. Indeed, earlier this year, a U.S. District Court rendered an opinion overturning a jury's \$3.5 million punitive damages award for retaliation claims on the grounds that the employer had demonstrated it had made good faith efforts to implement anti-discrimination and anti-retaliation policies. *Wirshing v. Banco Santander de Puerto Rico, et al.*, No. 3:11-CV-02073-GAG (D.P.R. Jan. 7, 2015). If your "policy" is nothing more than telling managers and supervisors not to retaliate, then you are risking greater exposure.

In sum, just because an employee has filed a complaint against his/her employer, the employee should not be shielded from being effectively managed and disciplined, if warranted. The key is that the discipline needs to be for good and objective business reasons.

Tags: Retaliation