

Retaliation claim: A trap for the unwary employer

When employees complain they are being discriminated against or try to report some other company wrong doing, too often the employer's first response is anger and mistrust. Business owners and managers who find themselves in this position need to

stop, take a deep breath and think about the legal consequences before they act.

Imagine a scenario where a salesman resigns with the complaint that his sales manager has been discriminating against him. The company investigates and determines the allegations are false. In the meantime, the salesman, who had a non-compete agreement with the company, has gone to work for a competitor. Partly motivated by revenge for the baseless discrimination claim, the company threatens to sue the former employee for violating his noncompete agreement, although the company has failed to sue other former employees in the same situation. Despite having handled the discrimination complaint properly and a clear legal right to enforce the noncompete agreement, the unwary employer has just opened the door for the former employee to sue for retaliation.

In an alarming trend, businesses of all sizes are being hit with sizable judgments for retaliation. A jury recently awarded an illegal alien \$200,000 because the owner of a gas station reported a former employee to immigration officials after the immigrant filed a wage claim for overtime pay.

Charges of retaliation have gone from approximately 15 percent to almost 30 percent of the Equal Employment Opportunity Commission's caseload in the last decade, according to EEOC statistics.

These claims often are harder to defend than the underlying discrimination claims themselves. At a recent American Bar Association seminar, a prominent jury expert observed that juries essentially believe if an employee complains about something in the workplace, the employer

will take steps to "get even" in some way.

Federal and state laws protect whistleblowers who complain within and outside their companies.

Most employers understand it is illegal to discriminate on the basis of race, religion, gender,

age or disabilities, among other reasons. However, many employers — particularly small businesses whose managers or supervisors may not have been trained to handle discrimination claims or are inexperienced in handling them — are not aware that how you respond to complaints of unlawful treatment is as important as preventing unlawful conduct from the outset.

KEYS POINTS TO REMEMBER

■ Retaliation can come in many forms: firing, suspending, demoting or refusing to promote the employee; reducing the employee's pay and benefits; transferring an employee to a position that significantly reduces the person's responsibilities; and harassing the employee. Most courts and statutes look to see if there has been an "adverse" employment action or something that "materially disadvantages" the employee in a significant way. At least one court has determined that even the threat of retaliation is illegal.

■ Enforcement agencies dislike retaliation claims even more than they dislike the employer conduct that initially gave rise to the claim. Retaliation undermines the integrity of the enforcement process. Thus, agencies will take aggressive action against an employer even though they might not have chosen to pursue the basic claim itself.

■ Current employees are not the only ones who can sue for retaliation; former employees can sue as well. Negative job references given to future employers and suits against former employees can be the basis for retaliation claims.

■ Employees who assist the complaining employee also are protected. It is unlawful to retaliate against an employee who gives testimony in support of another employee's complaint or participates in any manner in an investigation, proceeding or hearing concerning alleged unlawful conduct.

PROTECTIVE MEASURES

■ Recognize when an executive, manager or supervisor appears to be really angry at someone who files a complaint and involve other decision makers.

■ Train managers to understand the dangers of retaliation.

■ Establish written policies that encourage internal complaints and prohibit retaliation. Even small businesses should have an employee handbook setting forth basic policies, including where and how to file a formal complaint.

■ Investigate employee complaints promptly and as confidentially as possible, limiting knowledge to those who absolutely need to know, but reminding those involved, including supervisors, alleged wrongdoers and witnesses, that retaliation is prohibited.

■ Review any action about to be taken against an employee who has complained about workplace issues.

■ Make sure everyone involved in employee supervision understands the rules regarding retaliation.

The moment an employee complains about unlawful treatment, the groundwork is laid for a subsequent claim of retaliation. Employers want to avoid the situation where they win the battle only to lose the war.

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Expert Opinion

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