Avoiding Employee Claims of Unlawful Retaliation

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Since 2000, the number of claims filed with the U.S. Equal Employment Opportunity Commission ("EEOC") each year alleging unlawful retaliation has roughly doubled — from 19,694 in 2000 to 37,836 in 2012. In fact, in 2012, 38% of all EEOC claims filed alleged retaliation. **Retaliation is now the most common type of discrimination alleged nationally, topping both race (34%) and gender (31%).**

Why have retaliation claims become so popular in recent years? There are two major reasons. First, legislative and case law developments have significantly broadened the scope of persons protected against retaliation, lowered the burden for establishing unlawful retaliation, and expanded the damages available. Second, the nature of retaliation claims, compared to harassment and other forms of discrimination claims, have resulted in a much higher success rate for retaliation claimants, which naturally has led to more retaliation claims being filed. This article explores this dangerous area of employment law and outlines steps employers should take to reduce their legal exposure.

Elements of a Retaliation Claim

To establish unlawful retaliation, an employee must generally establish that (1) he/she engaged in a protected activity, (2) the employer took some adverse action against him/her, and (3) a causal connection existed between the protected activity and the adverse action.

To establish protected activity, an employee must show (a) "participation" in an activity protected by the employment statute (e.g., filed a claim, testified, assisted or participated in an investigation, proceeding or hearing) or (b) "opposition" to an unlawful employment practice prohibited by the statute. Protected opposition may include, among other things, making complaints to management, protesting against discrimination in general, or expressing support of co-workers who have filed charges of discrimination or harassment. Determining whether an employee's opposition to an employment practice is protected activity can be tricky because an employee need not establish the conduct opposed was in fact unlawful; rather, the employee must only demonstrate a "good faith, reasonable belief" that the underlying conduct violated the law.

Broadening Coverage and Damages

The U.S. Supreme Court has issued a series of rulings broadening anti-retaliation coverage and protection. In *Robinson v. Shell Oil Co.*, the Court ruled that who is an "employee" under Title VII of the Civil Rights Act of 1964 should be read broadly to include former employees, reasoning that this broadening would further Title VII's anti-retaliation provision's "primary purpose of maintaining unfettered access to Title VII's remedial mechanisms."

In *Thompson v. North American Stainless, NP*, the Court ruled that when an employee claimed that he was discharged because his fiancée, a co-worker, had filed an EEOC charge, the employee fell within the "zone of interests" protected by Title VII. The Court ruled that Title VII broadly covers employer conduct that could dissuade a reasonable worker from engaging in protected conduct, and that an employer's retaliation against the worker's close associates, in this case his fiancée, constitutes such dissuasion.

In *Kasten v. Saint-Gobain Performance Plastics*, an employee claimed that he was discharged for orally complaining that his employer's time clock failed to record all compensable time. The Court ruled that the Fair Labor Standards Act's anti-retaliation provision protects employees who make oral complaints even though the provision refers only to those employees who have "filed" a complaint.

Most significantly, in *Burlington Northern & Santa Fe Railway v. White*, the Court ruled that a retaliatory "adverse action" need not be related to the employee's terms and conditions of employment. Rather, unlawful retaliation occurs whenever the adverse action or harm would have the effect of discouraging a "reasonable employee" from making a discrimination complaint. In pronouncing that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm," the Court effectively lowered the standard for establishing retaliation under Title VII.

In addition to these U.S. Supreme Court rulings, Congress has passed legislation expanding the range of damages for retaliation claimants and expanding anti-retaliation protections. The Civil Rights Act of 1991 amended Title VII and the Americans with Disabilities Act to permit awards of compensatory and punitive damages. The Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Whistleblower Protection Enhancement Act of 2012 have given anti-retaliation protections to a broader range of individuals.

The Role of Human Nature

Broadening anti-retaliation protections only partially explain the rapid rise in retaliation claims. The fact of the matter is that, compared to other types of claimants, retaliation claimants are more likely to succeed in their claims and to recover greater damages. The higher success rate and greater damage awards result in more claims being made.

What makes retaliation cases different? It appears to be a function of human nature and how jurors and other fact-finders believe people react when they are accused of wrong-doing. It is expected that a supervisor who learns that a subordinate has complained to HR (or a government agency) concerning the supervisor's behavior will have difficulty treating the subordinate as if no complaint was made. However, that is what the law requires.

As one commentator put it, "anti-retaliation laws require almost super-human restraint." And juries know that supervisors are not superhuman, and that it is only natural for them to want to strike back at people who attack them and accuse them of wrongdoing.

In a typical employment discrimination case the plaintiff often faces an uphill battle persuading jurors that the manager involved in the employment decision acted as the result of some bias against the plaintiff's race, sex, age or other protected characteristic. In retaliation cases, however, jurors are more willing to accept the plaintiff's claim that his/her manager treated the plaintiff differently after the plaintiff accused the manager of discrimination or harassment.

In other words, it is easier for jurors to conclude that a manager followed his/her natural impulse to strike back than it is for jurors to conclude that a manager acted based on some invidious intent to discriminate against a particular protected class of people. This helps explain the growing number of cases in which plaintiffs have failed on their underlying discrimination or harassment claims yet prevailed on their retaliation claims.

Unfortunately for employers, the fact that jurors may view as natural the desire to strike back at disloyal and troublesome employees has not deterred jurors from punishing those employers whose managers have succumbed to basic human nature. Successful retaliation claimants are routinely awarded punitive damages, in many cases exceeding $1 million. The bottom line here is that jurors hold employers accountable when they fail to protect employees from unlawful retaliation.

Steps Employers Should Take to Reduce Exposure to Retaliation Claims

1. Implement a Policy Prohibiting Unlawful Retaliation

There are many steps employers can and should take to reduce the risk of retaliation claims and make the claims that are made easier to defend. Employers should start with a non-retaliation policy. Employers should already have anti-discrimination and harassment policies. If these policies do not address retaliation, then employers should amend their current anti-discrimination and harassment policies to include a strong non-retaliation statement that encourages employees to come forward with complaints of unlawful conduct without fear of reprisal and provides a process for employees to report acts of retaliation.

2. Provide Training

Like a harassment policy, a non-retaliation policy will only go so far, however, unless managers and supervisors understand what it means and how it should be applied. Accordingly, employers should provide training on what types of conduct constitute retaliation and how to respond when a complaint is brought to their attention. This training should be documented so, if needed, the employer can show the steps it has taken to prevent unlawful retaliation.

Employers also should provide claim-specific training/counseling. In other words, when an employee makes a claim of discrimination, harassment or other unlawful conduct, the managers, supervisors and, where appropriate, co-workers who work with the claimant should be counseled concerning their non-retaliation obligations. This counseling should be documented.

3. Do Not Ignore or Isolate Claimants

Employees who complain of unlawful conduct should not be ignored or treated as pariahs. Rather, the employer should be proactive and engage with the claimant. The employer should explain its anti-retaliation policy and procedure for redress. The employer should provide the claimant with a copy of the policy and offer to assist the claimant if he or she experiences problems. The discussion should be documented. Generally, employers should follow up with the employee later to ensure that there have been no further incidents or other problems.

4. Consider Additional Protective Measures

In some situations the employer should consider restructuring the work environment, perhaps allowing the claimant to report to a different supervisor, changing performance evaluators, or implementing alterna- tive work schedule so as to reduce, if not eliminate, the risk of retaliation. Employers should be careful to ensure that such changes do not appear to be retaliatory. The employer may consider having the employee “sign-off” on the change to document the employee’s agreement and to eliminate (or, at least, reduce) the risk that the employee will later claim that the workplace restructuring itself was an act of retaliation.

5. Closely Review Subsequent Employment Actions

Subsequent employment actions affecting a claimant should be reviewed before implemented. HR, legal counsel or other appropriate management personnel should review any proposed employment actions affecting a claimant to ensure that unlawful retaliation is playing no role in the action.

Reviewers should ask:

- Is the proposed action consistent with the employer’s actual practice when presented with similar performance deficiencies or misconduct?
- Is the proposed action supported by appropriate documentation?
- Is the claimant now being criticized or disciplined for performance or conduct that the employer deemed acceptable or tolerated prior to the claim?

- Would an unbiased observer think the action was reasonable?
- Would the employer's "best employee" be treated the same way?

A cool-headed review of the situation before any action is taken often saves an employer (and the managers and supervisors involved) from the significant legal risks and financial exposure posed by retaliation claims.

To discuss your company's approach to employment claims of retaliation, please contact our **Employment Law Group**.

Check out Bob Shea's Retaliation Claims video above!