Documenting Employment Decisions



Documentation of employment decisions is often seen as a chore. But in many instances, it can be an employer's get out of jail free card in employment litigation. Nowhere is this more evident than in the recent flood of retaliation cases. In recent years, employers have seen a marked rise of retaliation cases being filed by disgruntled employees. Retaliation cases have risen in popularity because of the low level of proof needed to establish a potential retaliatory activity. Essentially, if an employee can show that there might be a link in time between an adverse employment action and the employee's exercise of a legal right (such as taking FMLA leave) then an employee will be able to withstand an employer's effort to dismiss a case before trial.

This is where the documentation comes into play. Because the time element is so important in the analysis of retaliation cases, clear documentation regarding the timing of certain employment decisions may eliminate any potential claim of retaliation. Take a recent FMLA case out of Maryland as an example.

The employee at issue was a plant manager who took covered FMLA leave to recover from cancer surgery. Shortly after he returned to work after his leave, he was terminated for poor performance. The employee sued the company for retaliation, claiming that he was terminated for taking FMLA leave. The elements of retaliation were clearly present in this case – the employee took covered FMLA leave, and he experienced an adverse employment action (termination) shortly after his covered leave.

However, the facts were not as simple as the employee had everyone believe. The employer's documentation demonstrated that approximately four months before the employee requested FMLA leave, a decision was made that the employee was to be replaced and a search was initiated for his replacement. In fact, the employee's replacement was brought in for an initial interview over one month before the employee requested medical leave. The determination that the employee was to be fired occurred long before the employee requested medical leave for his cancer surgery. While the FMLA's retaliation provision provides that an employee is entitled to be restored to his or her job – or an equivalent position – when returning from FMLA leave, the employee is not entitled to a job that would not have been there for the employee regardless of whether the leave was taken. Because the decision was made to terminate the employee before he went out on medical leave – even though the termination decision was not communicated until after the employee returned from leave, the key date was when the decision was

made – the employee could not establish a link between his taking of FMLA leave and his termination. Therefore, the court found that the company did not retaliate against the employee.

The employer avoided a potentially sticky situation in this instance because the employer kept clear documentation of the dates of all of the decisions made relating to the employee – from when the employee first started having trouble on the job, to when the decision was made to replace him, through the date when his eventual replacement was interviewed. By presenting the court with a clear paper timeline, the company was able to avoid liability in a matter that on its face looked to be trouble. The moral of the story is that even when on its face it looks as if the facts of a particular situation give off the appearance of impropriety, having solid documentation to defend employment decisions can go a long way to avoiding liability.