Preventing Retaliation Claims by Employees



When an employee brings forward a claim of discrimination, harassment or another violation of workplace law – to you, to a government agency or to someone within your business – it must be taken very seriously. Also, be careful not to take any action that the employee might view as punishment or retaliation for the complaint, or you might find yourself on the wrong end of a lawsuit. It is illegal to retaliate against an employee for bringing forward a claim of discrimination and other workplace violations – and retaliation can be in the eye of the beholder.

All employers, managers, supervisors and human resources representatives should become familiar with the law of retaliation because retaliation claims are becoming more and more common. And they are also becoming costlier. Even if the original complaint turns out to be unfounded, the employee can still win a retaliation claim if he or she can prove that something negative happened as a result of the claim.

RETALIATION DEFINED

Retaliation means any adverse action that you or someone who works for you takes against the employee because he or she brought forward a claim of harassment or discrimination or some other violation of a workplace law (such as a health-and-safety law or a wage-and-hour law). Employees who participate in an investigation of any of these claims are also protected – for example, you cannot retaliate against an employee for giving a statement to a government agency that is looking into a discrimination claim or workplace safety issue.

Adverse action includes demotion, discipline, firing, salary reduction, negative evaluation, change in job assignment or change in shift assignment. Retaliation can also include hostile behavior – by you or someone who works for you – toward an employee who brings forward a claim.

GOOD INTENTIONS ARE NOT ENOUGH

Although retaliation obviously includes any action that you take with the intent to harm or punish the employee for the claim, it can also include actions that you take with the best of intentions – if those actions have a negative impact

on the employee.

For example:

- A female employee alleges that her supervisor is sexually harassing her. In response, you change the employee from the day shift to the night shift so that she doesn't have to work with the supervisor any more. Even though you didn't intend to hurt the employee, this action could be retaliatory if the employee preferred the day shift.
- An employee complains to you that the store in which he works is racially hostile toward him because his co-workers tell racial jokes and refer to him with racially derogatory names. In response, you transfer the employee to another store. This action could be retaliatory if the new store is farther from the employee's home or the position is less desirable in some other way.

In both of the above examples, the employer made the mistake of focusing on the employee who brought forward the allegations rather than focusing on the wrongdoer. When someone brings forward a claim of something unlawful in the workplace, the employer's job is to fix the problem – not avoid it by removing the employee with the claim from the situation. By focusing on the employee, the employer took actions that could be viewed as retaliatory.

STRATEGIES TO PREVENT RETALIATION.

As soon as someone brings forward a claim of discrimination or other unlawful action in the workplace, the groundwork is laid for a retaliation claim – unless you take some precautionary steps:

- Establish a policy against retaliation. Even before an employee brings forward a claim, you should have in place a clear policy against retaliation. Your policy should spell out exactly what retaliation is, and it should make perfectly clear that you will not tolerate retaliation from any of your managers or other employees. It should also tell employees what steps to take if they feel they are being retaliated against.
- Communicate with the employee who brought forward the claim. Explain that you are taking the claim seriously. Tell the employee that you want to hear about anything that happens that the employee considers hostile or negative. Refer the employee to your ant retaliation policy. Explain what retaliation is. Tell the employee flat out that you won't tolerate retaliation from anyone in the company.
- Keep confidential any claims that you receive. The fewer people who know about a claim, the smaller the chances are that someone will retaliate against the person bringing forward the claim. Of course, when you investigate the employee's allegation, you will have to tell some people about it. Make sure that you tell only the people who absolutely need to know. And when you tell them, explain what retaliation is and tell them that you won't tolerate it.
- Document, document, document. Take notes of everything you do to prevent retaliation. Send the employee with the claim a letter confirming what you have told him or her about retaliation.

THE PROBLEM EMPLOYEE.

An adverse action is only retaliation if it is done because the employee brought forward a claim. You are free to take adverse actions against an employee for other reasons, even if that employee has brought forward a discrimination claim or some other unlawful workplace situation.

For example:

- If the employee performs his job poorly, you can give the employee a negative evaluation.
- If the employee is habitually late for work, you can discipline the employee for tardiness.
- If the employee brings a gun into the workplace, you can fire the employee.

The problem for employers is that some employees will claim that these adverse actions are retaliation – even if the actions have nothing to do with the employee's claim. If you must take an adverse action against an employee who has brought forward a claim, be prepared to defend that action and to show that you had valid reasons that were unrelated to the claim. Those reasons should be supported by prior warnings to the employee that you have documented and preserved in your files.