



Ranting About Retaliation

By Liz Tascio
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As if being named in a discrimination case wasn't bad enough, it's becoming more and more likely that the same employer will eventually face a charge of retaliation, too.

Retaliation was one of the top three charges filed with the Equal Employment Opportunity Commission in 2006, just behind discrimination based on race and sex. The number of retaliation claims has gone up 20 percent since 1997, from 18,000 a year to 22,500.

Plus, the definition of retaliation was expanded by a Supreme Court decision last summer.

"You need to be aware of it as HR professionals because it's the one thing you can help head off," said Judith Moldover, an attorney with Ford & Harrison LLP. "Anyone can sue you for discrimination. ... The trick is to be in a position that if you do get sued, you've got the leverage because you did everything right."

As with any other claim, having good policies and practices in place can make a claim of retaliation less likely, or at least increase the chances it's dismissed. At the Human Resources Roundtable in June, Moldover explained how a retaliation claim develops and how to help your employer prevent one.

A landmark retaliation case

The case that set the new standard for retaliation claims was Burlington Northern & Santa Fe Railway Company vs. Sheila White. White was hired as a track laborer for Burlington Northern – an unusual job for a woman because it requires heavy manual labor, Moldover said. White was the only female in the group; she was hired partly because she could drive a forklift.

Shortly after she was hired, the forklift driver on her shift left the job, and White was given that duty.

"Well, this didn't work well," Moldover said. "She's the only woman assigned to the unit, and now she's got the cushy job."

Meanwhile, one of her supervisors had started complaining to her that a woman shouldn't be a track laborer, and made other inappropriate comments, Moldover said. White filed an internal complaint and a charge with the EEOC. The company suspended the supervisor, requiring him to undergo training.

Shortly after, the hiring manager told White that it wasn't fair to the men that she drove the forklift, and he was removing her in favor of someone with more seniority.

“They were allowed under that collective bargaining agreement to do it because it’s all the same job classification,” Moldover said. “But here’s the issue: They did it within days of her complaining about sexual harassment.”

White filed a second charge with the EEOC, this time a retaliation charge. Not long after that, she was suspended without pay, during the holidays, for insubordination. She filed a third charge, also retaliation. The EEOC sent the case to a jury.

Burlington Northern, in its own investigation, found the insubordination accusation groundless and reinstated White with full back pay. The jury also found for White and awarded her damages. However, Burlington Northern appealed, and the case made its way to the Supreme Court.

“The Supreme Court says, ‘Of course we’re upholding this verdict even though there are no economic damages,’” Moldover said. “Money is not always what people are unhappy about. At the end of the day, people want to be treated fairly.”

From an HR standpoint, there were ample opportunities to diffuse the situation, Moldover said.

“Think about the guys: They’re all there waiting for this plum job, and here’s this new kid and they put her in there,” she said. “Nobody was talking to anybody.”

White was the only woman, and perhaps the first ever, to work in this unit, Moldover said.

“Should someone have been saying to the supervisor, ‘Hey, this is the first time you’ve got a woman in there with the guys, you should be looking out for certain things?’” Moldover said. “‘I want you to support this woman, or we could have a nice lawsuit here for just plain old sex discrimination, never mind going up to the Supreme Court on retaliation.’ There are a lot of interventions along the way that could have happened.”

The components of a retaliation charge

Retaliation charges have three components: First, a person has to have been engaging in a protected activity that the employer knows about; second, the person has to have experienced an adverse employment action; and third, that action has to be linked to the protected activity.

“The Burlington Northern case focused on the middle part, what is an adverse employment action,” Moldover said. “The standard the Supreme Court came up with is ... anything that would make an employee think twice about exercising their legal rights.”

Imagine a worker has to bring her child to daycare no earlier than 8 a.m., and her supervisor moves her shift a half hour earlier.

“For most people, that may be a pain in the neck and unpleasant, but it’s not a big deal,” Moldover said. “But let’s say we’re talking about a single working mother who now can’t even arrange for child care, and it throws her whole world into disorder.”

That could be an adverse action, Moldover said.

Others include cutting pay, firing an employee, passing him over for promotion, transferring her to a less desirable location, or giving a poor – and false – review.

An adverse employment action could also happen outside work. Moldover cited an instance in which a law enforcement agent working on a dangerous case was denied a routine request for off-duty protection; he'd filed a discrimination claim earlier.

"The court said, 'Yeah, that's actionable,'" Moldover said. "This guy's life is now in danger only because he was trying to exercise his legal rights."

Who's protected, who's not

The first part of a retaliation charge, engaging in a protected activity, has two categories under Title VII, Moldover said: opposition and participation. (Almost all employee-protection laws include language that prohibits retaliation, she added.)

An employer can't discriminate against an employee or an applicant because he has opposed any practice that's prohibited by Title VII, or because he has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing related to Title VII.

The complaint – the opposition – has to be reasonable and made in good faith, Moldover said, or it's not a protected activity. It can't be vague, and it can't be disruptive; it can't take the form of endless e-mails, phone calls, or gripes.

"Participation is a little easier to spot because it has to involve some kind of legal process," Moldover said. "Let's say another employee has filed a charge, and the EEOC starts investigating and talking to your employees, and you know about it. Those people are protected also."

In fact, participation garners more protection than mere opposition, even if an employee files a false charge, Moldover said.

"You can't fire the person for filing that charge," she said. "[However,] if someone goes and complains internally, and you find out they're lying through their teeth and they did it because somebody's having an affair with their wife, that person is not protected."

There may be instances when an employer wants to file a counterclaim of defamation.

"You've got to think about whether it's really worth it," Moldover said. "If you take some legal action against an employer who's suing you or even filed a charge, you could end up having to defend yet another retaliation charge."

A significant number of charges filed at the EEOC have no merit anyway, Moldover said.

"You see case after case after case where the employer lost a retaliation lawsuit, but the underlying cause, the discrimination charge that started the whole thing, was B.S. and got dismissed long ago."

The importance of timing

The third piece of a retaliation charge is causation – proof that the adverse employment action is linked to the protected activity. Plaintiffs usually point to the timing of an action; for example, an employee is fired two days after complaining about sexual harassment.

“Timing alone generally cannot be used to show causation unless the timing is really short, like six or seven days,” Moldover said. Beyond that, there has to be additional evidence, such as an undeserved bad review or stray comments by a supervisor.

However, an employer can’t be paralyzed by the fear that any action taken after a complaint will be seen as retaliation, Moldover said.

She gave an example of a female hospital worker who filed a gender discrimination charge after a male doctor called her lazy.

Shortly after, patients and co-workers started to complain about her bad attitude and poor work. Her employer didn’t overreact, Moldover said.

“Every time there was a complaint, they went to her and said, ‘What happened?’” Moldover said.

Eventually, an error in a patient’s chart triggered a full review, including all prior complaints. She was suspended, and she sued for retaliation. The court sided with the employer.

“They said, ‘Yeah, she was terminated three months after complaining, but look at all of what happened. The employer had good cause. They did not act precipitously,’” Moldover said.

Judith Ann Moldover, Esq. serves as a resource for business leaders who want to make legally compliant, practical employment decisions, especially when changing business conditions affect human resources. Of counsel to Ford & Harrison LLP in New York City, Ms. Moldover advises her clients about employment policies and practices, as well as restructuring and reductions in force, outsourcing, sales and acquisitions.

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