



Seven Tips for Avoiding Retaliation Claims (And Still Hold Poor Performers Accountable)

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Experienced Human Resources professionals know this dilemma all too well – slackers and malcontents who have learned to use the threat of retaliation claims as a sword instead of a shield. Besides failing to perform their duties, these employees regularly grouse or nitpick, almost daring their supervisors to intervene. Meanwhile, frustrated supervisors put off dealing with poor performance or disruptive conduct.

While it can seem tempting in the short term to ignore such difficult employees, this approach only makes matters worse when the situation inevitably boils over. Thus, supervisors need extra support and attention while managing a poor employee, especially one who has engaged in some sort of “protected activity.”

Retaliation Claims Are Tricky, Increasingly Prevalent

Many statutes prohibit retaliation against employees who engage in certain conduct, though it can be difficult to determine just what constitutes protected conduct or for that matter, what constitutes retaliation. Protected activity is not necessarily limited to making a complaint or “whistleblowing.” It could be something as seemingly innocuous as making a workers’ compensation claim or asking for an ADA-related accommodation.

The U.S. Supreme Court has determined that a tangible employment action, such as termination, is not necessarily required to establish retaliation under Title VII of the Civil Rights Act. On top of that, retaliation charges filed with the EEOC have increased by about almost 25 per cent during the past 10 years and nearly one-third of all charges now include retaliation allegations.

Besides Title VII, the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA) and myriad whistleblower statutes provide protection against retaliation.

To establish a retaliation claim, a current or former employee may only need to show materially adverse action that would tend to discourage a reasonable worker from engaging in similar protected conduct. So even when an original complaint such as discrimination fails, a retaliation claim may still succeed.

Moreover, courts and juries tend to be sympathetic and generous toward employees who they think have experienced retaliation.

The Seven Tips

Putting an opposite spin on the “seven deadly sins,” you can take effective action to stem this threat. Although they may not prevent all retaliation claims, these tips will better prepare your company to deal with such claims when they arise:

1. Encourage your managers to seek assistance.

The goal is to help managers recognize potentially protected activity. It may be as obvious as making a complaint of sexual harassment or as subtle as taking FMLA leave. But whatever the nature of the activity, managers must continue to follow company policies and practices consistently. Failure to do so can be disastrous. Guidance from seasoned HR professionals can therefore be invaluable.

2. Spend time guiding the troublesome employee’s supervisor.

Failure to deal with problems timely only creates more problems. In fact, a manager’s silence is usually viewed as approval. Unless it is warranted, a positive performance appraisal will certainly undermine the company.

It is therefore critical to help busy managers ensure steady, consistent and honest communication with employees. This is even more important in situations where emotions are likely to run high. Consistent communication will help the manager avoid making ill-advised decisions or acting in a manner that appears to be vindictive.

3. Maintain, publicize and enforce your company’s policies prohibiting retaliation.

Leave no doubt that your complaint procedures encompass reports of possible retaliation. Employees must of course have options regarding how and to whom they may complain.

Investigate and document complaints just as you would respond to complaints of discrimination or harassment. Be sure the complaining employee provides details about the alleged retaliatory conduct and what he believes is the basis or reason for the retaliation. Have the employee verify that he has told you about all instances of alleged retaliation and instruct him to notify you if other incidents occur.

4. Don’t overlook the “small stuff.”

While trivial harms are generally insufficient to carry the day for a retaliation plaintiff, details are critical. By itself, a legitimate warning notice of substandard performance probably will not sustain a plaintiff’s claim. But coupled with a humiliating, public rebuke; a barrage of warnings; ostracizing; or reassignment to undesirable duties or locations, the result could be altogether different. It’s critical to get detailed descriptions of all of the complaining employee allegations.

5. Don’t overreact against the alleged retaliator or the employee who claims retaliation.

It usually takes time and patience to ferret out an accurate picture of what occurred. Get all the facts before making any decisions. Do not dally, but take a reasonable period of time to consider your findings.

6. This should go without saying, but act upon your findings.

Your actions should be timely and reasonably intended to put a stop to any inappropriate conduct. Managers who engage in unlawful retaliation may expose the company to significant liability. So, if it's warranted, disciplinary action needs to reflect the severity of the offense.

7. Seek review and input from an authorized manager who had nothing to do with the underlying allegations.

This is especially important whenever a company is considering terminating an employee who has engaged in protected activity within the relatively recent past.

If practical, it may be ideal if the reviewer is not even aware of the employee's protected conduct. But this doesn't mean that the reviewer's investigation should be superficial however. It should, at minimum, include review of relevant documentation and detailed discussions with the primary investigator or those who played a key role in the alleged retaliation. By all means, the review must involve more than a discussion with the alleged retaliator (or the person who will be accused of retaliation in the event of termination).

Bonus Tip: Always close the loop with an employee who complains. Without divulging confidential information, let him know the results of your investigation and what, if any remedial steps you are taking. Most importantly, make sure the employee knows that he must report any further suspected incidents of retaliation.