Better Check The Brakes

Insights
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The previous month's sales numbers are final and Jane's sales are abysmal...again. You've had enough and decide to fire her. You call HR to get the paperwork started. Your HR manager tells you that Jane has just left her office after complaining that she never gets house deals, she's forced to split her deals with the guys, and the desk regularly rejects her deals which results in her having low sales.

She also complained that the desk managers are always hitting on her, talking about sexual topics, and looking at porn on their phones. Your first thought is that Jane only complained because she knew she was about to be fired. After all, given how much she talks about sex at work and the language she uses, there is no way she was offended.

Should you go through with the termination – or put the brakes on? Can employees anticipating or expecting disciplinary action protect their jobs by engaging in protected activity before the ax falls? Maybe. Even though you have the right to take legitimate disciplinary action, doing so around the time an employee engages in "protected activity" creates a significant risk of giving rise to a retaliation claim.

Our advice? Use caution.

The Importance Of Proving "Why"

Most labor and employment laws have "anti-retaliation" provisions that protect employees' rights to voice concerns or make good-faith complaints about conduct or actions they believe to be inconsistent with legal standards and requirements. For example, the anti-discrimination laws protect employees' rights to complain about harassment and discrimination, to participate in an

investigation of a complaint, to oppose harassment and discrimination, and to file a charge or a lawsuit without fear of reprisal.

Likewise, OSHA and similar state safety laws protect employees' right to raise concerns about safety issues. Federal and state wage-and-hour laws protect employees' rights to raise certain concerns related to pay practices. Leave laws protect employees from retaliation for exercising their rights to request or take leave. Even the bankruptcy code includes an anti-retaliation provision that in some circumstances protects employees who file for bankruptcy protection. Whistleblower protection provisions related to financial dealings are becoming more prevalent.

Employees who raise concerns or make good-faith complaints about conduct inconsistent with legal requirements and those who exercise their rights under these laws (*e.g.*, FMLA) are engaging in protected activity. In other words, they are doing something the law protects their right to do. But remember that these laws provide protections for employees who suffer adverse employment actions *because* they engaged in protected activity. Laws do not protect employees from the legitimate consequences of their own misconduct or their poor performance.

Adverse employment actions may take the form of discipline, discharge, denial of a promotion, transfer, raise or other benefit, and pay cuts, as well as other employer actions that may have an adverse effect on the employee for exercising a legally protected right.

Timing Is Everything

Many times, timing is the employee's best evidence of retaliation. In the example above, Jane engaged in protected activity when she complained to HR about discrimination and harassment. Although you had decided to terminate her before you knew that she had done so, the timing of the termination is almost guaranteed to result in claims of discrimination and harassment.

She may argue that her sales were not a problem for you until she complained or that others (males and non-complainers) have had similar sales numbers and were not fired. You could win on her underlying claims, *i.e.* prove that there was no discrimination or harassment, but still lose the retaliation claim if the facts show or suggest retaliation. Remember, it's not your *intent* but what you can prove that wins the day.

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To lower the risk of a retaliation claim, many employers treat employees who have engaged in protected activity as somewhat "bulletproof" for purposes of disciplinary action, at least temporarily. Before taking action, evaluate whether you can convince a skeptical third party – the EEOC, a jury, or an arbitrator – that the disciplinary action was unrelated to the protected activity.

Review your previous actions under similar circumstances, how you have treated other employees who had similar performance or conduct issues, and whether you can show that this employee violated an established policy and practice. Confirm the existence of proper documentation and ask yourself whether, after considering everything, an outsider would think that the planned disciplinary action is the next logical step. If the results of this informal review are "positive" for going forward, take your foot off the brake. The risk of a retaliation claim is lessened – but not eliminated. In close calls, smart employers pull back and wait until next time.

Employers must also consider whether they can prove they made the adverse action decision before the employee engaged in protected activity. One preventive measure that you can take is to document the intent to take the action before doing so. This can be as simple as sending an email to HR or vice versa informing the recipient the specified disciplinary action is planned, and verifies that the timing is before the manager meets with the employee. This "paper trail" will establish that you decided to take the disciplinary action before you were aware of the protected activity.

The Bottom Line

The risk of a retaliation claim is real. In each of the last three years, there were more retaliation charges filed with the EEOC than any other type of charge. By taking consistent actions and proceeding with caution after an employee engages in protected activity – which sometimes means having to put on the brakes – employers can lower the risk of retaliation claims.

For more information contact the author at TCoffey@laborlawyers.com or 404.231.1400.

Related People

Tillman Y. Coffey
Partner
404.240.4222
Email