The Chicken Or The Egg?

Insights
10.01.14

You finally decided to take the long overdue disciplinary action. Jack has got to be disciplined. But just before you do, Jack, possibly sensing what's about to happen, makes a complaint of harassment. This is the first you've heard of this problem. Is the complaint legitimate? What do you do? Continue with the planned disciplinary action? Put your decision on hold while you investigate? Will it look like retaliation if you proceed with the discipline?

On the one hand, employers have the right to take disciplinary action. On the other hand, employees have the right to make good-faith complaints about what they believe is unlawful conduct without fear of reprisal. In situations such as the one described above, the issue will be which came first – the decision to take disciplinary action or the complaint of harassment.

Payback Time
To further the purpose of protecting employees' rights, 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.

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Because these laws protect employees' rights to raise concerns and take other actions, an employee who raises a concern under one of these laws is deemed to have engaged in "protected activity." The employee in the hypothetical above engaged in protected activity when he complained about harassment. Retaliation occurs when an employer takes an adverse employment action against an employee because the employee engaged in protected activity. Thus, if the employee in the hypothetical above establishes that he was disciplined because he complained, his retaliation claim likely will succeed.

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

In many cases, the timing of the adverse employment action is usually the employee's best evidence of retaliation. By way of example, Jill is a productive employee. She has an attendance problem but has never been formally disciplined. In July, Jill complained about sexual comments by her manager, and about her coworkers viewing porn at work (the complaint is protected activity).

In August, Jill is terminated for excessive absenteeism (an adverse employment action). Jill alleges that her termination was in retaliation for her July complaints, even though her poor attendance record is irrefutable. Her theory is that her attendance was not problem for the company until she made her complaint. She also may be able to bolster her claim with evidence that other employees with comparable attendance records who had not made a complaint were not terminated.

Retaliation claims are on the rise. In each of the last three years, there were more retaliation charges filed with the EEOC than any other type of charge. In most cases, the retaliation charge or lawsuit also includes a claim or claims of discrimination, harassment, or some other alleged unlawful actions by employer. The charge or complaint may allege that the retaliation occurred in response to the employee's complaint about the underlying conduct believed to be unlawful. Even if the employee does not prevail on the underlying claims of unlawful conduct, the employee may still prevail on her retaliation claim if she can show that her employer took the adverse action against her for engaging in protected activity.

Staying Out Of Trouble

To avoid these difficult and hard-to-defend cases, many employers consider employees who have engaged in protected activity to be somewhat "bulletproof" when it comes to taking disciplinary action against them. In these situations, even before taking a legitimate disciplinary action, prudent

action against them. In these situations, even before taking a legitimate disciplinary action, prudent employers will carefully consider whether they can convince the EEOC, a jury, or an arbitrator that the disciplinary action had nothing to do with the employee's exercise of her protected rights.

Issues to consider are what actions have been taken in the past under circumstances such as these. Have all employees with the complaining employee's performance or conduct issues been treated the same way? Are there established policies and practices that have been violated? Is there documentation of disciplinary actions that occurred before the protected activity? Would the planned disciplinary action seem to an outsider to be the next logical step considering everything? If the answer is "yes" to all
these questions, the risk of a retaliation is lessened but not eliminated. In close calls, smart employers pull back and wait until next time.

So, what about Jack, who seemingly made a protected complaint in anticipation of disciplinary action? We can't know without more background facts. But one way to lessen the risk in situations such as this one is to document the decision as soon as it is finalized and before it's communicated. The employee's manager can send a simple email to Human Resources or vice versa informing the recipient of the planned disciplinary action and the timing of same before the manager meets with the employee. This simple step should resolve the eternal issue of which came first – at least in this case.

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