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WITH TERMINATION LOOMING, EMPLOYEE COMPLAINS: GET OUT OF JAIL FREE CARD?

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Can someone anticipating or expecting disciplinary action protect his job by engaging in protected activity before the ax falls? In other words, will making a complaint or requesting leave act as a "get out jail free card" for an employee facing an adverse action?

The short answer is that employers have the right to take legitimate, nondiscriminatory actions against employees, even those who have engaged in protected activity. The longer answer is that employers should be aware of possible retaliation claims if they do and make sure they have taken steps to minimize those risks before taking the action.

Most labor and employment laws have "antiretaliation" 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 antidiscrimination 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'; rights to raise concerns about safety issues.

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Federal and state wage-and-hour laws protect employees' rights to complain about pay practices. Leave laws protect employees from retaliation for exercising their rights to request or take leave. Even the bankruptcy code includes an antiretaliation provision that, in some circumstances, protects employees who file for bankruptcy protection. Whistleblower protection provisions related to fraud and financial dealings are becoming more prevalent.

The "adverse employment action" that gives rise to the retaliation claim may take the form of discipline, discharge, pay cuts, denial of a promotion, transfer, raise, or other benefit, as well as other employer actions that may have an adverse effect on the employee.

Many times, timing and inconsistency are the employee's best evidence of retaliation. Consider "Jane." who worked for "ABC Company." Jane was a productive employee with a long-standing attendance problem for which she was never disciplined— until her termination.

In July, Jane complained that her manager made sexual comments and sent inappropriate text messages to her (which she kept). In August, ABC Company terminated Jane for excessive absenteeism. Jane files a retaliation claim, even though her poor attendance record is irrefutable. Jane's retaliation theory is that her attendance became a problem only after she complained. Her claim is bolstered if she has evidence that other,"noncomplaining" employees with comparable bad attendance records were not terminated.

Retaliation claims are on the rise. In each of the last 3 years, more retaliation charges were filed with the EEOC than any other type of charge. In most cases, the retaliation charge or lawsuit includes a claim or claims of discrimination or harassment. In Jane's complaint she may say that she was subject to harassment and was retaliated against for complaining about it. ABC Company may prevail on the harassment claim but lose the retaliation claim if the facts show that her termination was retaliatory.

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. Before taking action, prudent employers recognize the risk of a retaliation claim and then carefully evaluate whether they can convince the EEOC, a jury, or an arbitrator that the disciplinary action was unrelated to the protected activity.

This evaluation includes reviewing their previous actions under similar circumstances, how they treated other employees with similar performance or conduct issues, and whether they can show that this employee violated an established policy and practice. They will confirm the existence of proper documentation and ask themselves if the planned disciplinary action would seem to an outsider to be the next logical step considering everything.

If the results of this informal review are "positive" for going forward, the employer may take the action with the understanding that the risk of a retaliation claim is lessened, but not eliminated. In close calls, smart employers pull back and wait until next time.

Employers also must consider whether they can prove they made the adverse action decision before the employee engaged in protected activity. One preventative measure that employers can take is to "document" the intent to take the action before doing so. To do so, the employee's manager need only send a simple email to the Human Resources Department or vice versa explaining the planned disciplinary action and the expected timing before the manager meets with the employee. This simple step can go a long way to proving that the adverse decision was made before the employee's complaint or other protected activity.

By taking these steps and proceeding with caution, which sometimes means having to wait, employers can trump the employee's "get out jail free" card. Remember, in most cases, it is not your true intent that matters, but what you can prove that wins. Consistency, documentation and patience will provide that proof.

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