



WORDS ON WISE MANAGEMENT

Retaliation charges on the rise: how to protect your company

by Joe Godwin
F&H Solutions Group

In 2013, the Equal Employment Opportunity Commission (EEOC) investigated 93,727 charges of discrimination, which resulted in penalties totaling \$372.1 million. Retaliation claims accounted for 41 percent of all the charges. The most frequent bases of claims across all statutes are related to discharge and discipline. Therefore, employers have opportunities to reduce the risk by thoroughly documenting and reviewing all practices before, during, and after any adverse action toward an employee.

Retaliation claims have increased sharply over the past 10 years. U.S. Supreme Court decisions, legislation, and case law have provided antiretaliation protections to a broader range of individuals, resulting in a lower threshold for establishing a claim and increased potential damages.

Retaliation claims are easier to prove than other discrimination charges, including many cases in which employees have failed on their initial claims yet prevailed on their retaliation claims. Successful retaliation claims are very expensive and can often include punitive damages.

Requirements for a retaliation claim

To establish unlawful retaliation, an employee must show that (1) he engaged in a protected activity, (2) the employer took some adverse action against him, and (3) there is a causal connection between the protected activity and the adverse action.

“Protected activity” includes filing a charge, testifying, assisting in an investigation, or being in “opposition” to a practice that is unlawful (or is believed in “reasonable good faith” to be unlawful) by complaining to management or expressing support of co-workers who have filed charges of discrimination or harassment.

What can you do?

You can take a number of steps to reduce the risk of and better defend against retaliation claims.

(1) Strengthen policies on discipline and termination. Remember that a large percentage of retaliation claims arise from disciplinary actions or

terminations. Ensure that all such actions are reviewed in advance and are well documented and defensible.

(2) Strengthen policies prohibiting retaliation. Publish a separate policy broadly covering all applicable laws, such as the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSH Act). Encourage employees to come forward with complaints of unlawful conduct without fear of reprisal, and provide an effective process for employees to report acts of retaliation.

(3) Provide training. Train managers and employees on what types of conduct constitute retaliation. Train managers how to respond to a complaint, and provide claim-specific training and counseling at the time a complaint is made.

(4) Work with the employee. Don’t ignore or avoid the employee who raised the complaint. Be proactive and engage with him, even during the investigation process. Explain your antiretaliation policy and the procedure for redress, provide the complaining employee with a copy of the policy, and offer to assist him if he has problems. Follow up with the employee after the resolution to ensure there are no further incidents or residual problems.

(5) Take protective measures as necessary. Any change in the work environment affecting an employee may be well intended, but it must not appear to be retaliatory. Ask for a voluntary written acceptance of or request for changes from the employee.

(6) Review subsequent employment actions. HR and/or legal counsel should review subsequent employment actions affecting the complaining employee before you implement them to ensure that unlawful retaliation is playing no role in the action.

By consistently following written procedures and policies, training management teams, and exercising caution and restraint, employers can effectively reduce the risks associated with the rise of retaliation claims.



Joseph Godwin, a consultant for F&H Solutions Group, assists clients in a variety of compliance matters, with an emphasis on wage and hour issues. Contact him at 828-687-4071 or jgodwin@fhsolutionsgroup.com. ❖