

Continued Stream of Retaliation Claims Highlights Importance of Responding Properly to Employee Complaints

While most employers are familiar with the laws that prohibit discrimination and harassment in the workplace, they sometimes do not know how to respond to complaints of discrimination and harassment when they arise. The continued stream of lawsuits alleging retaliation against employees highlights the importance of responding carefully to complaints of discrimination or harassment.

When confronted with a complaint of discrimination, harassment or other unlawful conduct, employers should generally respond by conducting a prompt, thorough and impartial investigation, preferably under the direction of counsel. Although managers may have pre-conceived notions about the merit (or lack thereof) of a particular complaint at the outset, the objective of every investigation should be to determine whether the complaining employee's allegations are true, not to disprove them or to facilitate a quick return to "business as usual." Employers that undertake investigations for the purpose of discrediting the complaining employee or sweeping the controversy under the rug as quickly as possible significantly increase their potential liability because the investigation itself can then be cited by the employee as evidence of insensitivity to discrimination and harassment.

If the investigation reveals that the complaint lacks merit, the information obtained through the investigation will be very useful in defending against any claims the employee may later assert in court. On the other hand, if the investigation produces evidence of misconduct by the persons accused, the employer can then take appropriate corrective action and cite the investigation and subsequent remedial action as evidence that it takes complaints seriously and responds to them as a responsible employer would.

Employers can utilize human resources representatives or other management personnel to conduct investigations, but most managers (even those in human resources) are not trained to conduct investigations. For this reason, as well as others, employers should strongly consider hiring independent investigators to conduct any necessary investigations. At a minimum, the investigation should include interviews with the complaining employee and the individual(s) who allegedly engaged in the conduct giving rise to the complaint. If third parties witnessed the conduct or are aware of information otherwise relevant to the claim, the investigator should interview them as well.

Once the investigator has gathered all of the relevant information and documents, management representatives and the employer's attorney should review the information and determine whether violations of law or policy have occurred. Employers should evaluate the evidence carefully and avoid the temptation to conclude that they cannot determine whether a violation occurred merely because the statements of the parties conflict. If the evidence supporting a complaint is more credible than that against it, the employer should conclude that a violation has occurred. If a violation

has occurred, some form of discipline is appropriate, even if the misconduct has ceased. At the conclusion of the process, the employer should inform both the complaining employee and the accused employee of the result of the investigation and emphasize that retaliation against the complaining employee is forbidden.

Aside from investigating employee complaints properly, employers should also be careful to prevent managers who have been accused of discrimination, harassment or other unlawful practices from making employment unilateral decisions which affect the complaining employee adversely. When a manager is accused of an unlawful employment practice by an employee and soon thereafter makes a decision that affects the complaining employee adversely, the employer may be vulnerable to allegations of retaliation regardless of the merit of the original discrimination or harassment complaint or the legitimacy of the subsequent decision. In order to minimize the risk of retaliation claims, employers should either direct other managers (and/or human resources representatives) to confer with the manager in question and make any necessary decisions jointly, or remove the manager from the decision-making process entirely until the risk of a retaliation claim has subsided to an acceptable level.

By responding to complaints in this manner, employers will demonstrate that they are sincerely opposed to discrimination and harassment and will reduce their risk of liability. If you have any questions about discrimination or harassment claims or investigations, or any other issue relating to employment law, please contact one of our attorneys:

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