BusinessManagement DAILY

APRIL 17, 2011

Don't get even: The rules, risks of post-employment retaliation

The typical retaliation scenario involves an employer firing an employee who has complained about discrimination or engaged in some other protected activity.

What happens, however, if the employer retaliates *after* the end of the employment relationship? Do the anti-retaliation laws cover allegations of post-employment misconduct?

The short answer is yes.

What is retaliation?

To understand why, let's start with the statutes themselves. Ohio's anti-retaliation provision—O.R.C. § 4112.02(I)—makes it illegal for any person to discriminate in any manner against any other person because he or she:

- Opposed any unlawful discriminatory practice
- Made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under sections 4112.01 to 4112.07 of the Revised Code.

All of the federal anti-discrimination laws (Title VII, the Age Discrimination in Employment Act, the ADA and the Genetic Information Nondiscrimination Act) contain similar prohibitions.

Courts consider retaliation anything that would dissuade a reasonable employee from protesting or participating in protected activity in the first place if he or she knew what their employer would do.

Who is an employee?

You might think that because the term "employee" seems to indicate an active employment relationship, retaliation isn't possible against former employees. But that's not necessarily the case.

In *Robinson v. Shell Oil Co.* (1997), the U.S. Supreme Court concluded that the term "employees" in Title VII's retaliation provision includes former employees, too. The justices said a plaintiff could "bring suit against his former employer for post-employment actions allegedly taken in retaliation." Because of the similarity in language across the federal and state statutes, it's safe to assume this result applies across the board.

What should employers do?

What does this mean for employers? It means that retaliation does not stop on the last day of employment.

It means that employers must treat former employees who have engaged in protected activity with the same kid gloves they use on current employees. And, it means that former employees can sue you for post-employment adverse actions such as:

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- A negative job reference
- The denial of pension credits or other benefits to which the employee was entitled
- Filing a police complaint
- Threats and ostracism
- The filing of a lawsuit or counterclaim

This last category—involving lawsuits and counterclaims—warrants some additional explanation.

Caution on countersuits

In *Greer-Burger v. Temesi*, the Ohio Supreme Court concluded that "an employer is not barred from filing a well-grounded, objectively based action against an employee who has engaged in protected activity." In so ruling, the court balanced "the statutory right of an employee to seek redress for claims of discrimination without retaliation against the constitutional right of an employer to petition courts for redress."

In other words, because a company has a fundamental First Amendment right to petition and seek redress in the courts, objectively based claims and counterclaims are not retaliatory.

Despite the fundamental nature of that right, the court recognized that the right to access courts is not absolute. The First Amendment does not protect "sham" litigation—that is, an objectively baseless lawsuit from which no reasonable litigant could expect success on the merits.

When a retaliation claim is based on the filing of a countersuit, the burden falls on the employer to demonstrate, as its legitimate nonretaliatory reason, that an alleged retaliatory lawsuit is not objectively baseless.

Just because employers are not *per se* liable for retaliation when filing claims against an employee who engaged in protected activity doesn't mean they should rush into court against these employees. Instead, employers should be wary of using *Greer-Burger v. Temesi* as carte blanche to countersue employees who sue them.

As the concurring opinion in that case pointed out, "the majority's 'not objectively baseless' test sets a very low threshold…." Just because *Greer-Burger* gives employers the apparent right to file a claim does not mean ultimate success on that claim.

Indeed, employers need to carefully think through their litigation strategy before deciding to pursue a claim against an employee or ex-employee who has brought a discrimination claim. Make sure it's not just a knee-jerk reaction to being sued or otherwise accused of discrimination.

Final note: Always check with your attorney before doing anything that might be interpreted as retaliation.

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