Making a frivolous complaint is not protected activity

Good news for employers: When employees file frivolous complaints, it doesn't count as a protected activity. That means an employee can't set up his employer by filing a nonsensical discrimination claim and then waiting for some perceived punishment or imagined slight to create a retaliation lawsuit.

Courts seem to be catching on to that common practice. Employees who know they are in trouble because they broke a company rule or haven't been performing often think filing a discrimination complaint with HR or the EEOC will make them "untouchable."

Until recently, that's been a sound strategy. Courts have often bent over backward to rule that any adverse employment action might be retaliation if it affects an employee who has complained about discrimination. Helped by a U.S. Supreme Court case that says retaliation is anything that would make a reasonable employee think twice about complaining, courts have found retaliation even when the underlying complaint turns out to be wrong—that is, no discrimination took place.

As the following case shows, the tide may be turning. Making a frivolous complaint isn't protected activity and won't support a retaliation lawsuit.

Recent case: John Barker was a correctional officer and shop steward at a special needs unit that houses inmates with mental illness and disabilities. When a new officer began work, a manager asked him how he liked the unit. The officer said he didn't like it much because the inmates behaved poorly.

The manager then told the officer that perhaps he needed special training, unlike female officers who "by and large" do a better job than men because they are "more patient and nurturing." Barker helped the new officer file a sexual harassment complaint against the manager.

Then, Barker was suspended after he allegedly used force on an inmate and failed to report the incident. He fired back with a retaliation lawsuit, alleging that the charges had been trumped up because he had helped the new officer file the sexual harassment complaint.

The 8th Circuit Court of Appeals dismissed the lawsuit. It said that the underlying sexual harassment claim was frivolous, and that neither Barker nor the officer could possibly have believed they were making a good-faith complaint. Therefore, their complaint was not protected activity. That meant anything the employer did to punish Barker could not have been retaliation. (*Barker v. Missouri Department of Corrections*, No. 07-1422, 8th Cir., 2008)

Final note: Title VII of the Civil Rights Act protects employees from retaliation if they have "opposed any practice made an unlawful employment practice." It also protects those who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." In other words, if a co-worker testifies in court or answers questions from an EEOC investigator, the employer cannot retaliate.

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Employers should be careful not to discourage employees from participating in an investigation. That may also violate the National Labor Relations Act, which protects employees from punishment for discussing working conditions.