Blowing the whistle

How to manage whistleblower and retaliation claims

In an era of increased employment litigation claims for discrimination, many former employees are claiming to be whistleblowers or victims of retaliation for reporting violations of the law. In order to avoid complicated, costly lawsuits, employers must understand what constitutes retaliation and when an employee can be protected as a whistleblower, says Caroline A. Grech-Clapper, a partner at Secrest Wardle.

"Because whistleblower and retaliation claims are often fact-intensive, courts are more inclined to let the case go to a jury to be decided," Grech-Clapper says.

Smart Business spoke with Grech-Clapper about who qualifies as a whistleblower and how employers should handle these claims.

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Who qualifies as a whistleblower?

A whistleblower is an individual who takes action to report wrongdoing that has occurred or is ongoing in the workplace or in the industry. They report serious wrongdoing observed on the job, such as when employees or superiors are engaging in conduct that violates state or federal laws, regulations or rules, refusing to comply with relevant statutes or guidelines, covering up wrongdoing, or engaging in fraud. Employees are protected if they have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age or disability. Individuals who have a close association with someone who has engaged in protected activity also are covered. For example, it is illegal to terminate an employee because his or her spouse participated in employment discrimination litigation.

What is considered retaliation?

Retaliation occurs when an employer, employment agency or labor organization takes an adverse employment action against the employee. An adverse action is termination, demotion, harassment for filing a charge of discrimination or participating in a discrimination proceeding, or otherwise opposing discrimination. Examples of retaliation include:

- Termination, refusal to hire or denial of promotion
- Threats, unjustified negative evaluations or negative references, or increased surveillance
- Assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights

What acts are protected?

Reporting a violation of law, regulation or rule to a public body or being asked by a public body to participate in an investigation are protected acts. The employer must have notice of the employee's intent, and termination must be due to the employee's involvement.

Examples of protected activity include:

- Complaining to anyone about alleged discrimination against oneself or others
- Threatening to file discrimination charges
- Picketing in opposition to discrimination
- Refusing to obey an order reasonably believed to be discriminatory
- Cooperating with an internal investigation of alleged discriminatory practices
- Serving as a witness in an EEOC investigation or litigation
- Requesting a reasonable accommodation based on religion or disability.

What acts are not protected?

Employees are not engaged in a protected activity if they have no evidence of a violation of the law, or suspicions were not reasonable at the time that person reported or threatened to report the act. Examples of activities that are not protected include those that interfere with job performance that render the employee ineffective or activities such as acts of violence.

Is there a statute of limitations?

The whistleblower's claim must be brought within 90 days from the date of the adverse action. The employee cannot avoid the statute of limitations by pleading another theory of liability. The Whistleblower Protection Act is the exclusive remedy. A retaliation claim will take on the statute of limitations pled by the initial claim and within the complaining forum. For example, an EEOC complaint must be made within 180 days of the adverse action. However, in state court, the statute of limitations is three years as provided by state law.

Can the statute of limitations be shortened?

If the company requests that the employee sign an agreement that would shorten the statute of limitations, it must be in a separate agreement to be enforceable. A separate policy puts the employee on notice that waiver of a right, arbitration or shortening of the statute of limitations is an agreement to acceptance of employment. Waiver of the ability to pursue any civil rights claim will not be enforced.

Can a company terminate an employee who claims to be a whistleblower?

An employee can be terminated as long as the termination is not because of the employee's engagement in a protected practice. Employees are not excused from performing their job or following the company's rules just because they have filed a complaint with the EEOC, made a complaint for discrimination or reported a legitimate concern to the appropriate agency.

The employee must show that he or she engaged in a protected activity or conduct, the employer 'actually or constructively' knew about the protected activity, the employee suffered an unfavorable personnel action and the circumstances 'were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.' Once the employee has established an initial claim, the burden shifts to the employer to articulate a nondiscriminatory reason for its conduct and, if the violation is under Title VII, to prove 'by clear and convincing evidence … that it would have taken the same unfavorable action in the absence of the employee's protected behavior or conduct.'

An employer's best defense is documenting why terms of employment are changing. <<

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