

HALL | FARLEY

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

Retaliation: Risks for the Idaho Employer

By Kara L. Heikkila

Your employee complains about discrimination by a supervisor and the supervisor, who denies the conduct, naturally resents the accusation. Is this supervisor fully trained on the risks of taking adverse action against the employee in response to this complaint, whether or not the underlying complaint is well-founded? Do your policies clearly prohibit such retaliation? Retaliation cases are on the rise according to both federal and state Fair Employment Practice agency statistics. The Idaho Human Rights Commission takes a particular interest in cases involving retaliation, given the broad-spectrum of rights affected when employers improperly take action against employees who oppose discrimination.

Agency Trends in Retaliation Cases

According to statistics published by the federal Equal Employment Opportunity Commission, nearly 35 percent of all charges filed with the agency in 2008 involved claims of retaliation. This is up from just 24 percent a decade ago. In fact, retaliation claims filed with the federal agency today are more common than discrimination claims based on sex.

Trends in Idaho are comparable. According to statistics recently published by the Idaho Human Rights Commission, 29 percent of the discrimination claims filed in the last year involved a charge of retaliation. The Idaho Human Rights Commission administers federal and state charges of discrimination in Idaho. The agency Director, Pamela Parks, advises that the Idaho Human Rights Commission often sees cases where the employee fails to establish a case of discrimination, but still prevails on the separate retaliation claim. As such, the agency believes it is important for employers and employees to understand and for employers to publish clear policies that no employee should be “chilled” from filing a charge of discrimination in the workplace because they fear retaliation. Given the impact such claims can have, the Idaho Human Rights Commission takes a strong interest in retaliation cases.

The Basics of a Retaliation Case

Retaliation claims require that three events take place: 1) the employee engages in “protected activity” by reporting of or otherwise opposing discrimination; 2) the employer takes adverse action against the employee; and 3) there is a connection between these events, that is, the employer takes the adverse action *because* the employee engaged in the protected activity.

Examples of protected activity include complaints about discriminatory behavior by another employee, threats to file a complaint of discrimination, or refusal to carry out a directive that an employee reasonably believes might be discriminatory in nature. Participation in a complaint investigation or other proceeding is also protected activity. For example, cooperating in an investigation by the employer or by the Human Rights Commission is protected. Discrimination complaints are limited to and based on the protected statuses: race, national origin, color, sex, religion, age and disability. This includes claims for wage disparity between men and

women, which are receiving increased attention based on proposed federal legislative in this area. Federal statutes, including the Fair Labor Standards Act (covering wage and hour claims) as well as the Family Medical Leave Act, also have anti-retaliation protections. Employees who bring forward complaints about violations of other laws or internal company procedures are not covered by federal or state anti-discrimination retaliation protections (but may be protected by other laws, such as Idaho's Whistleblower Act).

Notably, retaliation protection extends to former employees, to claims from your own employees about discrimination by employees of another employer who have contact with them during the course of their employment, and to employees who are themselves not engaged in protected activity, but merely have encouraged others to report such concerns.

What constitutes an "adverse action" in a retaliation case is often misunderstood. Generally an adverse action is tied to a monetary change in the employee's status. The clearest examples of this would include termination or demotion with a corresponding cut in pay. But adverse actions can be more subtle and still ultimately result in a monetary impact on the employee. For example, an employee may receive an unjustified negative evaluation after bringing a complaint of discrimination. A former employee may be given an unjustified negative job reference after filing a charge of discrimination at the time they left employment. Both the negative evaluation and the negative reference could result in a financial impact to the employee or to the former employee now looking for new work. Both of these scenarios could result in a claim for retaliation.

Connecting the protected activity to the adverse action is the final step in a retaliation case. The first two events must have taken place in order: the protected activity and then the adverse action. The timing of the two events is often important. That is, the closer in time that the adverse action is to the protected activity, the stronger a case for retaliation becomes. To avoid this result, you should implement procedures to assure that supervisors are trained regarding your retaliation policy. Additionally, your procedures should include a review of decisions made with respect to the employee at issue by another level beyond the supervisor in question to assure unbiased and fair decision making.

The U.S. Supreme Court this year decided a significant case answering, at least in part, how much "opposition" to discrimination is required in order to constitute "protected activity." *Crawford v. Metro. Gov't of Nashville & Davidson*. In that case, the employee participated in a sexual harassment investigation of her supervisor by her employer. During the course of an interview, the employee disclosed that her supervisor had sexually harassed her. The question before the Supreme Court was whether this disclosure itself was "opposition," even though the employee had not raised this previously and was not the employee whose complaints initiated the investigation. The Supreme Court answered this question by deciding that someone who takes no action at all beyond simple disclosure of the fact is indeed engaging in protected activity. In any event, this employee was protected by her mere participation in the investigation. Whether any suggestion in this decision that something close to "silent" opposition to discriminatory conduct would be "protected activity" was raised, but not entirely answered. For example, if an employee silently opposes discriminatory conduct, but fails to report it as such, it remains unclear whether the protections of the anti-retaliation laws would extend to that employee. That may occur when an employee refuses to participate in what they believe is a discriminatory practice, but does not otherwise report it as discrimination or otherwise voice that concern to their employer.

Tips for Avoiding Retaliation

First, you should have policies in place that clearly prohibit retaliation based on protected activity, either opposing discrimination or participating in any proceeding associated with such a complaint. A policy should include a clear statement that retaliation, just like the underlying discrimination or harassment, is prohibited by the employer. Accordingly, any violation of the anti-retaliation protection in the policy may result in disciplinary action up to and including termination. The policy should include directives for the employee to

report retaliation, just like any complaint of discrimination, and should allow alternative reporting mechanisms beyond the direct supervisor. Just as with the underlying complaint, employees should be assured that their concerns of retaliation will be handled as confidentially as possible.

Second, even a well-drafted policy must be clearly communicated to be effective. Employees should be trained on retaliation as a part of your anti-harassment training program and should be assured that bringing forward complaints will not have any consequence to them in their employment. Supervisors in particular should be trained on retaliation and sensitized to the importance of a proper and professional response to complaints raised by employees. Training should include examples of retaliatory conduct and the impact of taking such action.

Finally, when an employee makes a discrimination complaint, they should be reminded that they will not be retaliated against, provided another copy of the policy regarding retaliation, and told to report any conduct immediately that they believe might be retaliation. Similarly, when employees participate in an investigation or other process involving a complaint of discrimination, they should be carefully and specifically assured that they will not be retaliated against for that participation. After an investigation is concluded, you should follow up with the employee over time to monitor for both repeated behaviors associated with the complaint and for any action that might be retaliatory in nature. And as always, promptly investigate concerns of retaliation and take corrective measures, as necessary.

Bottom Line

Retaliation claims remain a significant risk for employers. And for Idaho employers, retaliation complaints will continue to receive the attention of the Idaho Human Rights Commission, given the broad impact across all types of discrimination that retaliation can have. Conventional wisdom is that a retaliation case is difficult for an employer to win in front of a jury, perhaps largely because retaliation strikes a chord of unfairness with most people. Effective and active policies and training prohibiting retaliation are critical to avoid this conduct and an associated claim.