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E-Letter

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ROSENTHAL LLP

To Our Clients:

Protection of employees against retaliation for complaining about employment discrimination was expanded by a Supreme Court decision issued June 22, 2006. *Burlington Northern and Santa Fe Railway Co. v. White*. The decision contains two holdings:

First, the prohibition against retaliation is not limited to formal employment decisions, such as termination, suspension, demotion, etc. Any kind of action, inside or outside the workplace, may be challenged as retaliation.

Second, to be retaliation, the action must be “materially adverse” to a “reasonable person” under the circumstances. This test is supposed to rule out trivial claims but is so vague and subjective that it increases the chances that a retaliation claim will survive pre-trial motions and be decided by a jury. Retaliation claims are the most difficult type of employment discrimination to defend. If a jury finds retaliation, punitive damages are inevitable.

While retaliation claims come up in all sorts of ways, they are most commonly brought by employees who have a history of performance problems. The employee initially complains of discrimination after an adverse decision (discipline, non-promotion, etc.) based on a performance problem. When the problem continues, the employer takes additional action, which may include discharge. At that point, the employee complains that the additional action was retaliation for complaining about the initial decision. There are several ways to avoid this trap.

1. The employer’s rules and performance standards should be clearly and consistently communicated to employees and supervisors. This will help avoid arguments over whether the employee complied with the rules and standards or whether the rules and standards were applied consistently.

2. Employee compliance with rules and performance standards should be well documented. To ensure consistency, all employees, not just the problem employees, should be documented.
3. Employment decisions should be reviewed by a central authority. A central authority, such as the human resources department, should review decisions to ensure that they are appropriate, adequately documented and consistent throughout the organization. This is especially true of decisions that carry a high risk, such as terminations.
4. If problems recur, the proposed action should be reviewed by a disinterested party. For example, if an employee has complained about a supervisor, further decisions involving the employee should be reviewed by someone else. Getting a second opinion will help ensure that the decision is not only unbiased, but perceived as unbiased.
5. Great care should be taken to ensure that complainers are treated consistently with other employees. It is often advisable to give them a little extra slack.
6. The rules regarding retaliation should be clearly communicated to all members of management. Since retaliation is not limited to employment decisions, all managers and supervisors should be made to understand that complaining about discrimination is a right that must be respected. Managers and supervisors must learn to keep a stiff upper lip and to treat complainers the same as other employees, even if they are upset about the complaint. The potential alternative, they must understand, is to suffer through years of litigation.
7. Employees should be provided a complaint procedure. Prompt and effective resolution of retaliation and other types of complaints will help prevent situations from escalating into legal claims.
8. Complaints about discrimination should be treated confidentially. One defense to a complaint of retaliation is that the supervisor who made the challenged decision was not aware of the discrimination complaint in the first place. Thus, in some cases, it will be advisable to refrain from telling a supervisor that a complaint was made.

For greater clarification, you may contact any Shawe Rosenthal attorney.

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