

Documenting Employee Performance Problems May Become Key Defense in Future Retaliation Claims

Labor & Employment Law Update

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According to the U.S. Equal Employment Opportunity Commission (EEOC), retaliation claims continue to be the most frequently filed charges of discrimination at the federal agency by far. According to the EEOC's Fiscal Year 2018 Enforcement and Litigation Data, retaliation claims made up 51.6 percent of all charges filed last year. Given their frequency, employers should be as proactive as possible in protecting themselves from these claims.

The Seventh Circuit recently affirmed summary judgment in a Title VII retaliation case, and in doing so sent a reminder to employers about the importance of properly documenting employee performance concerns. In *Rozumalski v. W.F. Baird and Associates, Ltd.*, the Seventh Circuit held that the plaintiff could not establish her retaliation claim due to an "insurmountable problem with timing," where her employer was able to point to negative performance feedback that predated any of her protected activity. Indeed, an employer may be able to negate an inference that it disciplined an employee because he engaged in protected activity if it can point to documentation of its concerns forming the basis for the discipline before the employee ever complained of discrimination or harassment.

Creating strong records of employee performance problems may serve as a strong defense to future retaliation claims. Employers should keep the following in mind regarding job evaluations and other documentation:

- All concerns with employee performance should be documented in writing, even including verbal counseling on performance issues.
- Documentation should avoid vague references to performance problems. For example, performance evaluations should not note problems such as "bad attitude" or "not a culture fit." These vague criticisms are too subjective and do not provide adequate coaching to the employee on what needs to be improved. Instead, employers should list specific examples of performance or attitude problems and the dates on which they occurred.

- Evaluations of job performance should never include personal attacks. The documentation should focus on the performance problem – not the individual. For example, rather than telling an employee that they are a very disorganized person, instruct the employee on what files or work matters need to be reviewed and filed or maintained in a more orderly fashion.
- Company expectations also need to be defined through concrete instructions. For example, rather than vaguely instructing an employee to always be on time, the documentation should note that the employee is expected to be present and ready every Monday for the daily 9 am meeting.
- Each criticism of an employee's job performance should be paired with specific coaching on how to improve and a deadline by which the employer expects the improvement to be achieved.
- Documentation should communicate that the employer is taking the performance problem seriously. This can be done by the employer following up on the problem to ensure it has been improved. The employer should also explain the specific consequences for not improving the performance problem by a certain date.
- Employee coaching or performance evaluations should allow for two-way communication between the employee and the employer so a discussion can occur regarding the problems and expected solutions. Documentation of the coaching or evaluation should confirm that the employee had an opportunity to discuss the issue.
- Documentation should be created so that a third party with no knowledge of the specific issues can understand the performance problem and the expected improvement. The documentation should give enough information to provide context to the issue and fully explain the circumstances.

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