

# Lack of Documentation Sinks Employer's Defense to Retaliation Claim

## Labor & Employment Law Update

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Timing may not be **everything** when it comes to employment retaliation claims, but it is a critical factor. An employee who can show adverse employment action taken on the heels of engaging in some type of protected activity (e.g. complaining to the EEOC) is in prime position to assert the employer unlawfully retaliated. A fundamental step to proving retaliation is to show the employer was aware of the protected activity at the time of the adverse employment decision. Naturally, an employer that is unaware of protected activity cannot retaliate against an employee for engaging in protected activity.

In a recent 7<sup>th</sup> Circuit retaliation case, the employer asserted it could not have retaliated against the employee for filing a charge with the EEOC because it made the decision to terminate the employee prior to getting notice of the EEOC charge of discrimination. The district court agreed and granted summary judgment in favor of the employer and dismissed the lawsuit. The 7<sup>th</sup> Circuit disagreed and revived the employee's claims – primarily because the employer did not have any documentation to show the decision was made to terminate the employee prior to learning about the EEOC charge.

The employee worked within a housing shelter and had been warned on numerous occasions about mistreating and threatening residents. The employer asserted that after it issued yet another warning to the employee, the employee accused coworkers and members of the board of lying to try to get him fired. The employer further asserted that the executive director and the board president met and decided to terminate the employee – 5 days before learning of the EEOC charge. However, the employer did not actually carry out the termination until the day after it received the EEOC charge.

The 7<sup>th</sup> Circuit pointed out the obvious – terminating the employee the day after it learned he filed an EEOC charge was suspicious timing. There were other factors that prompted the 7<sup>th</sup> Circuit to revive this case and give the employee his day in court, but the factor the 7<sup>th</sup> Circuit stressed most was that there was no documentation of the meeting in which it was decided to terminate the employee (which the employer claimed took place before notice of an EEOC charge). Had there been some form of authentic documentation to show the decision was made to terminate the employee 5 days before a copy of the EEOC

charge was delivered to the employer, it might have alleviated the court's concerns about the accuracy of the employer's story.

Retaliation claims now top the list as the most prevalent type of claim filed with the EEOC. The fact an employee engages in protected activity does not shield that employee from legitimate adverse employment action, but employers do have to be prepared to "prove" there was not a causal connection between the protected activity and adverse action. Detailed documentation of employment decisions is a must to break the causal connection – and ideally will show the employment decision was made by persons or at a time in which knowledge of the protected activity was unknown...the absolute best defense to a retaliation claim.

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