Recent Decision Highlights Risk of Post-Employment Retaliation Claims

Labor & Employment Law Update

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A federal court in Pennsylvania recently ruled that a former employee presented sufficient evidence to warrant a jury trial on a claim she was retaliated against *after she resigned*. The decision serves as a good reminder that anti-retaliation protections extend beyond the end of the employment relationship to protect former employees.

Cherie Leese complained of sexual harassment while employed by a state agency. She later filed a charge alleging she was issued discipline in retaliation for her report. The parties eventually settled. As part of that settlement, Leese resigned and agreed not to apply for or accept employment within a subset of state agencies. Leese expressly retained the right to seek employment in other areas of state government. When her numerous attempts to secure another position failed, Leese filed a new charge, this time claiming her former employer retaliated against her *after* she resigned by hindering her attempts to get a new job.

The state, like many large employers, coded former employees based on the circumstances of their separation. Leese was assigned an unusual code, "voluntary resignation contact former agency." Inquiries regarding Leese were directed to the agency's general counsel, who responded by stating, "I can make no comment regarding Ms. Leese's separation." Leese presented evidence to suggest the code and response were atypical and that they "raised a red flag" which took her out of the running for various positions.

A well-drafted release protects against claims stemming from conduct occurring *before* the agreement is signed, but individuals generally cannot waive their rights with respect to future events. As some courts have put it, "an employer cannot purchase a license to discriminate."

How to Prevent Post-Employment Retaliation Claims

So what steps *can* an employer take to protect against post-employment retaliation claims?

First, establish a protocol for responding to requests for information regarding former employees, train all supervisors on the protocol, and insist they follow it, *regardless* of the circumstances underlying an employee's departure. To better control what information is released, consider directing all requests to a designated individual or department (usually HR).

To prove retaliation – whether post-employment or otherwise – a plaintiff must link her protected activity to an adverse action. Leese's claim was bolstered by evidence that the agency deviated from its usual practice when responding to requests for information about her. The ability to prove that the plaintiff was treated in exactly the same manner as everyone else often allows an employer to avoid trial by defeating a retaliation claim on summary judgment.

Second, when negotiating severance or a settlement, expressly discuss whether the individual is eligible for rehire and what information the employer will provide in response to reference requests and other inquiries about the individual (** be mindful of restrictions in your local jurisdiction and/or industry – in Vermont, for example, including a no-rehire provision may invalidate a sexual harassment settlement). Incorporating the parties' agreement on these items into the formal agreement provides certainty for both parties and avoids surprises down the road.