

Employment Discrimination and Retaliation – Best Practices to Avoid Headaches

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There is little doubt that an employment-discrimination lawsuit is an unsettling experience for professional entities, no matter how large or small. Separate and apart from exposure, liability and monetary impacts, such claims can be distracting and disruptive to workflow, can cause industry and reputational harm, and can have a real impact on company congeniality and morale. The latter can be even more apparent when the circumstances are such that the claimant remains employed, or when the allegations make direct references to co-workers, or both. Additionally, the often-included claim of retaliation made in conjunction with an adverse employment action claim, warrants additional considerations.

If your insured or client finds itself in such a scenario, here are five helpful tips to avoid muddying the waters any further:

1. Don't Panic. This reminder is especially appropriate for those employers who may find themselves facing their first employment lawsuit. Inevitably and perhaps unfortunately, it may not be a matter of if, but rather a matter of when, a company is to face a discrimination-based suit. Thankfully, our industry is well-equipped to investigate and defend such claims, and it is advisable to set your insured and client's mind at ease early on.

2. Paper the File. For all cases, but especially for employment-based cases, proper documentation is essential. Meetings and conversations of significance should be memorialized in writing, unprofessional texts and emails should be avoided, and performance reviews and disciplinary measures must be documented in uniform fashion. When employers do this across their professional positions, e.g. new employee or senior supervisor, they will be all the more equipped to defend claims.

3. Business as Usual. Once an employment discrimination case arrives, and especially if the claimant remains employed, the employer or supervisor may have a fear of having to “walk on eggshells” regarding the claimant. In order to preserve the integrity of the organization, and out of fairness and equity to others, it is recommended to treat the claimant no differently than all other employees. Once again, proper documentation of any additional issues, should they arise, is also key.

4. Be Wary of Moving the Problem. Quite often employers may wish to relocate or reassign a claimant following the initiation of litigation. However, such a decision, if not welcome by the claimant, may create fertile ground for a retaliation claim. In *Muldrow v. City of St. Louis*, Missouri, the U.S. Supreme Court recently held that employees need not

show “significant, serious, substantial or any similar harm” to successfully challenge a job transfer under Title VII, thus finding that an involuntary job transfer may be sufficient to establish the “adverse action” element for an employment discrimination claim under Title VII. In other words, employees are no longer required to show that a transfer caused a “significant” employment disadvantage in order to proceed with their claims. See *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346, 144 S. Ct. 967, 972, 218 L.Ed.2d 322 (2024).

Evidence of recent retaliation litigation trends bears consideration. According to data from the U.S. Equal Employment Opportunity Commission (EEOC), retaliation claims are on the rise and thus these claims should not be taken lightly. EEOC Charges have increased by 44% between 2021 and 2024, with retaliation claims making up the largest percentage of all claims: (47.8% – retaliation, 38.0% – disability, 34.2% race, 31.4% sex, and 18.3% age).

5. Trust the Process. Once the appropriate on-boarding, job performance expectations,

review processes, and if necessary, performance improvement and/or termination processes are established and consistently executed, companies should trust in those processes to deliver. And if the same are not well-established, rest assured that assistance is readily available to put these necessary pieces into place.

An employment discrimination lawsuit is a serious matter with real consequences that can reach far beyond the pocketbook. Nevertheless, these matters can surely be mitigated and their impacts can be largely reduced with the proper guidance, oversight and counsel.



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