

Manager's Legal Bulletin

Alexander Hamilton Institute Incorporated

VOL. 23 NO. 13 JANUARY 1, 2009

RETALIATION ROUNDUP

Discover whether retaliation claims can survive both long and short gaps of time between a protected activity and an adverse employment action, and whether such claims can survive an employee's inappropriate actions.

A LONG TIME COMING

Scenario: Six months after filing a discrimination complaint, a Hispanic employee is laid off. His employer argues that the six-month lapse between the complaint and the termination is too long to show a causal connection between the two.

IS THIS RETALIATION?

Yes. An appeals court found that "all was not well" during those six months. There was a pattern of adverse actions against the employee beginning shortly after he complained and lasting until he was laid off. A pattern of escalating adverse action can show a causal connection, despite a long gap between the complaint and the termination. The employee was awarded over \$235,000.

TIME IS SHORT

Scenario: A 64-year-old employee is laid off the day his employer receives notice of his age discrimination charge from the Equal Employment Opportunity Commission (EEOC). His manager claims he made the decision before he saw the notice, and blames poor business conditions and lack of available work.

IS THIS RETALIATION?

It could be. An appeals court allowed the employee to go to trial based only on the timing of the termination with the employer learning of the EEOC complaint; the employee offered no other evidence that the termination was actu-

ally motivated by the EEOC charge.

If an employer fires an employee immediately after learning of a protected activity, a causal connection between the two actions can be inferred. That is because the employee would be unable to couple temporal proximity with any other evidence of retaliation. To rule otherwise would give employers good reason to retaliate swiftly.

WORKPLACE DISRUPTION

Scenario: A university employee rejects the advances of his female supervisor, which leads to episodes of hostility and mistreatment by the supervisor. When the supervisor confronts the employee about an office phone bill, she uses profanity and threatens violence. The employee calls campus police. He is fired for "unprofessionalism." The university maintains that the employee's involvement of the police was unnecessarily disruptive.

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IS THIS RETALIATION?

Yes. An appeals court held that an employee cannot waive his right to police protection simply because police involvement may be disruptive to the workplace. Otherwise, the termination of an employee who reported a rape by a supervisor to the police would be permitted.

The court clarified that involving the police in an employment dispute will not always be considered protected activity, but in this case, the call was allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment. →

FMLA Regulations Finalized

The long-awaited changes to regulations governing the Family and Medical Leave Act (FMLA) were published in November 2008. They become effective January 16, 2009.

The regulations clarify both employers' and employees' rights and responsibilities under the Act, and provide guidance on the expansion of the FMLA for military family members.

Be on the lookout: The February 1 issue of **MLB** will tell you how these regs may affect the way you manage your employees' absences.

Retaliation... (cont.)

EVIDENCE BACKFIRES

Scenario: A female employee claims sexual harassment by a co-worker. Her employer ensures the two do not work together unsupervised and launches an investigation. Before the investigation is completed, the employee surreptitiously tape-records a meeting between her and two managers. When her employer discovers the recording, it fires her for violating a state law prohibiting eavesdropping. She claims she was engaged in protected activity because her aim was to get evidence of discrimination.

IS THIS RETALIATION?

No. Illegal eavesdropping is not a protected activity for purposes of a retaliation claim. *Said a court:* Employees who complain of discrimination do not have a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination. Inappropriate workplace activities are not legitimized by an earlier-filed complaint of discrimination. MLB

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STAY OUT OF EMPLOYEES' RETIREMENT PLANS

Some employees who planned on retiring in the near future have decided not to due to the state of the economy. Bad news for those employers that need to cut costs and were counting on those employees voluntarily leaving. If you're facing cutbacks and are anxious to know the retirement intentions of your employees, you must walk a fine line between inquiring about their plans and pressuring them to expedite those plans.

EMPLOYEE IS GOING STRONG

"Happy birthday, Lonnie," said manager Matthew Fontana.

"Thanks!" Lonnie Brady replied.

"You're 64, right?" Fontana asked.

"Yep...but I feel like I'm 44," Brady said with a smile.

"Wonderful! You should be out enjoying yourself instead of working here," Fontana said. "Ever think about retiring?"

"No, not really," answered Brady. "I like working. I'll probably work until I can't anymore."

Fontana tucked that piece of information in the back of his mind.

MANAGER HAS WEAK CASE

Not a year later, the company was in full cost-control mode. Managers received the directive from above to cut overhead. Fontana immediately thought of Brady's high salary. The manager transferred him to a less desirable position and replaced him with a younger worker. Fontana claimed that Brady's performance was slipping.

Brady filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC). The EEOC found that discrimination had occurred and filed a lawsuit on his behalf. In court, the company maintained that transferring Brady was a legitimate, non-discriminatory move. The EEOC pointed out that all of Brady's performance appraisals were positive.

In the end, the company settled the suit. The EEOC expressed hope that the settlement would encourage employers to "think twice before subtly or overtly

pushing senior employees towards retirement in order to save money, or for any other illegal purpose based on age."

LEGAL INQUIRIES

Nothing in the Age Discrimination in Employment Act (ADEA) prohibits you from asking employees about their retirement plans. What you can't do is pressure them to hurry up and carry out those plans. When it comes to making retirement inquiries, employ these best practices:

- Ask only if you have a legitimate need to know, such as succession planning. Preface the inquiry by explaining your reason for asking.

- Present the facts. For example, if upper management has indicated that the company is experiencing financial hardships and that involuntary layoffs are likely if not enough workers agree to a voluntary layoff or retirement, tell employees precisely that.

- Limit asking about an employee's retirement plans to only once or twice a year. Frequent questioning could be seen as undue pressure or harassment.

- Never press for a reason behind an employee's decision not to retire. Your understanding of, or agreement with, the decision is not needed; badgering the employee for a reason sends the message that it is.

- Don't subject employees to negative job consequences if they disclose they don't plan to retire (or retire soon). Firing them, denying them a promotion or training opportunity, or assigning them undesirable work or to an undesirable

(Continued on page 3)

FOOD FIGHTS!

While you probably don't have to deal with employees flinging food at one another across the company cafeteria, you may have to contend with some other management issues that arise when employees bring food into the workplace.

FOOD FIGHT #1: STOLEN SANDWICH

Unable to work through the growl of his empty stomach, Mark Tomlinson decided to take an early lunch. He couldn't wait to sink his teeth into the meatloaf sandwich he had prepared from last night's leftovers.

"I can't believe someone actually took my sandwich," Tomlinson remarked when he discovered that his lunch was missing from the company fridge.

"I'm not surprised," a co-worker replied. "Last week, my soda went missing."

Food for thought: If food is being stolen from the company refrigerator, try posting a sign stating that theft, including food items, is grounds for termination. Even if your company doesn't have surveillance equipment, warning that the kitchen is subject to electronic monitoring might do the trick!

Retirement Plans... (cont.)

location in an effort to motivate them to retire, will leave your company open to a discrimination charge.

Of course, the same holds true if the employee does indicate a plan to retire in the near future. Taking an adverse employment action based on this information will also likely violate the ADEA. Think twice before denying a promotion or training opportunity to an employee merely because they wish to retire soon — they may *want* to retire, but may not be *able* to financially. Besides, promoting a younger employee does not lower the risk that the employee will leave in the near future, whether to work for another company or to stop working at all.

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Signs should be a supplement to addressing the issue in department meetings. Remind employees that food items are the personal property of the person who brought them in and are not communal property, in case of a misunderstanding. Also be sure to instruct employees to clearly mark their food items. Items might have been taken by accident, if employees buy the same brands (and flavors) of food.



Illustration by Jay Thompson

FOOD FIGHT #2: DESKTOP DINING

One whiff of her co-worker's lunch and Tara Rooney felt sick to her stomach. Unable to take it any longer, she complained to her manager, Linda Goddel.

"Can't you ban her from eating at her desk?" Rooney pleaded. "The smell of the fish she's eating today turns my stomach."

"I've spoken to her about this before," Goddel responded. "She doesn't like to go out for lunch."

"All I ask is that she eat her lunch in the break room, so I don't have to smell it," Rooney replied.

Food for thought: Requiring employees to eat their lunches in the break room away from co-workers and customers is not a bad idea. Although odor is one reason to disallow desktop dining, there are several other reasons.

For one, consider the image portrayed if your employees have public contact. Not very professional. And you wouldn't want to risk offending customers/clients with food odors or employees speaking with food in their mouths.

Even if employees don't have public contact, there is also the concern that splatters or spills will find their way on to, say, important papers, computer equipment, etc.

Finally, there are also issues with roaches and rodents if employees leave behind crumbs.

FOOD FIGHT #3: WORKING LUNCHES

When manager Karen Kelly noticed that her newest employee, Dennis Martin, often worked through lunch and ate at his desk, she was impressed by his dedication. Sure, the company didn't approve of working lunches, but she didn't want to quash his enthusiasm.

Martin worked through his lunch every day for several months. That is, until his job was eliminated in a company-wide downsizing. Although he had never asked Kelly to pay him for his working lunches, he headed straight for the Department of Labor and demanded compensation for his time.

Food for thought: This is one of the primary reasons you shouldn't allow employees to work through their lunch. Meal periods generally do not need to be paid. However, if a non-exempt employee does even a minimal amount of work during that time (e.g., answer a couple of phone calls), the Department of Labor might expect you to compensate the employee for his/her time.

Also beware of employees who do a minimal amount of work while eating lunch and expect to be paid, and then also expect to be able to take their unpaid meal break on top of that to run errands or leave early.

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WHEN EMPLOYEES BUTT HEADS, MANAGERS NEED TO USE THEIRS

Sometimes co-workers just don't get along — there's no illegal harassment or discrimination going on, or over-the-top bullying or fisticuffs, just plain old personality conflicts. That's fine — people don't have to like each other in order to work together effectively. But it is up to you to rein in employees and stop these conflicts from having a negative impact on your department.

IF YOU CAN'T PLAY NICELY...

Store manager Diana Falco was at her wit's end. Squabbling employees Emily Chen and Isabelle Reed had alternately come into her office that morning, each complaining about the other one.

"Isabelle was rude to me!"

"Emily won't mind her own business!"

"Isabelle won't ever shut up!"

"Emily is so dumb!"

Falco's head was still spinning. She was surprised and, frankly, annoyed that these otherwise competent employees had started behaving so immaturely within the past month or so.

The last straw came when Falco found Chen and Reed arguing with each other

as they sat behind the customer service desk, oblivious to the embarrassed customers waiting in line.

Falco quickly went over and told the employees in a stern but quiet tone to go to her office and wait for her. She then turned to the customers with a smile, apologized for the melee, and handled their transactions. After finding another employee to man the desk, she went to her office, where she sat down and addressed the two women's behavior.

...THEN GET OUT OF THE SANDBOX!

"I am only going to say this once, so please listen carefully," Falco said calmly. "This is a place of business. It

doesn't matter whether or not you like each other, as long as you do your work competently and conduct yourselves professionally. If you are unable to do that, I will have no choice but to terminate you."

Both women started to object, but Falco put her hand up to stop them. "I'm serious. First of all, the two of you must stop coming to me with personal complaints about each other. It is not my job to referee your personal battles. Work out your problems on your own time.

"Second, neither of you is faultless, but assessing and correcting work-related issues is *my* job, so you needn't worry yourselves about what the other person might be doing wrong.

"Third, your behavior in front of customers just now clearly violated our customer service policy, so I'd be well within my rights to fire you both right now. I'm willing to give you a second chance because I value your talents. But this disruptive behavior must cease immediately, or I will be forced to replace you. Any questions?"

Chastened, Chen and Reed shook their heads and exited the office without uttering another word.

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Action Tips

Falco did a good job suppressing her desire to tell the two employees to grow up and stop acting like children, while still getting her point across. Here's what you can do to manage employees who don't get along.

- ➔ Lay down the law. State in no uncertain terms the types of behavior you want to stop, the types of behavior you want to see instead, and the consequences of failing to do so.
- ➔ Talk to employees together. That way, they both receive the same message, and they can't accuse you of siding with one over the other. Some people only hear what they want to hear, refusing to accept responsibility for their part in the conflict and finding any part of your message that is favorable to them. Then they try to use it against the other person, e.g., "Diana said she thinks you *are* abrasive." Holding a joint meeting will make it difficult for feuding employees to put words in your mouth.
- ➔ Address only the conflict between the two employees in the joint meeting. If you realize that one (or both) of the employees has a performance issue rooted in the conflict, address it in a private meeting. For example, if Falco had found that Chen went so far as to sabotage Reed's work, it would not be appropriate to have a disciplinary conversation with Reed present.
- ➔ Be a manager, not a counselor. Don't try to change employees' personalities or solve their personal problems. Instead, focus on setting and enforcing parameters for acceptable workplace behavior.
- ➔ Explain to employees that an "open-door policy" is not an invitation for them to grouse about petty differences. Legitimate, work-related complaints, issues, and questions are welcome — whining and finger-pointing are not.



SPOTLIGHT ON...



Preparing For A Layoff

The difference between downsizing being a horrible experience and one that is as painless as possible is managers. Because of your close relationship with employees, it's within your power to help those downsized to accept the decision and look toward the future and to rally remaining employees to new heights. The key to actualizing that power starts with careful preparation. (Next issue: *Managing After A Layoff.*)

PICK WITH A PURPOSE

Upper management tells you that you need to reduce your staff from 10 to seven. What do you do? It might be tempting to select for layoff the three employees with whom you least get along, but basing a decision to downsize on personal feelings is ill advised.

Your decision should be based on the reason behind the layoff. For example, if the organization needs to increase sales revenue, look at each employee's sales numbers. If it needs to attract clients, identify those employees that are the most outgoing and personable.

Unlike sales numbers, being outgoing or personable is subjective in nature. When using subjective criteria, point to specific examples to support your reasoning that an employee is, or isn't, outgoing or personable, such as an employee's willingness to volunteer to be a new hire's "buddy," a letter from a customer complaining about an employee's attitude, etc.

Since it's possible that two or more employees will be equally destined for layoff based on your initial selection criteria, it's imperative to plan what you will use as the final determining factor in selecting one employee over another. One option is to consider past performance. While you're looking at past performance, you're doing so with an eye toward future performance. Review the employees' two or three most recent appraisals; looking back any further isn't likely to be as good an indicator of current and, subsequently, future performance.

Once you've selected which employees to lay off, review your choices before submitting them to HR. If it appears that a particular group of employees — those over the age of 40 or minorities, for example — has been hard hit, re-examine your selections to ensure that the layoff is not having a disparate impact on a protected group. *Heads up:* Be mindful not to disproportionately dismiss higher-salary employees; because higher salaries are often associated with older workers, some courts have allowed these employees to file age-based disparate impact claims.

SAY IT WITH COMPASSION

If you're asked to break the layoff news to the employees in your department, develop a communication plan, advised Carol A. Hacker, president of Hacker & Associates (Alpharetta, GA), in a recent AHI webinar titled *HR's Role Before And After Downsizing*. "One of the areas I feel is often neglected is communication. I believe in over-communication."

Prepare an agenda, and practice what you're going to say. "It's not going to be canned. It will be practiced to the point of comfort with what's going to be said." Avoid just reading the layoff letter; that will seem impersonal.

Employ these best practices:

- Be honest and clear. Mostly importantly, explain the why behind the decision.
- Don't make empty promises. "Your credibility will be on the line," reminded Hacker.
- Explain that HR will discuss unemployment compensation, severance pay, vacation accrual, and benefits. Give them a timeline of when this will happen.

- Discuss outplacement services. If there is a rep from an outplacement center on hand, make employees aware of this. At the very least, provide them with the contact information of a local outplacement center.
- Address references. “Employees should know the company policy on giving references,” stated Hacker.
- Be prepared to listen. Said Hacker: “Make sure you have the time — and can give that time — if employees need to talk.” She cautioned, though, “Don’t try to be a psychologist. We need to be empathetic...but not go overboard in trying to help each individual in a way that we are not capable of or experienced doing.”
- Allow employees to clean out their own spaces. Doing it for them could give the impression that the company can’t wait for them to leave.
- Allow employees to say good-bye to co-workers. Denying them this dignity can result in them feeling ashamed and embarrassed.
- Most of all, thank employees for all of their hard work. It’s crucial they understand that the layoff isn’t being used as a means of discipline.

Affected employees are going to be distraught, but the more valued they feel, the less painful the experience will be, noted Hacker. Plus, the more valued they feel walking out of the workplace door, the less likely they are to walk into court.

RESPOND WITH CONFIDENCE

No matter how compassionately you say it, employees slated for layoff are going to question your decision. You need to have answers. Here are some common questions, followed by sample responses to guide you in formulating your own reply.

Remember, your goal is to provide the employee with an answer that is short, sweet, and effective.

Employee: Why me? Why my position?

Manager: I can’t stress enough that this is a business decision. It’s nothing personal. We needed to eliminate certain positions because of the declining sales. Unfortunately, the people attached to those positions had to be let go. *Or, if the decision is based on the employee’s sales numbers, for example, say:* Since our sales have been steadily declining, it’s imperative we increase revenue. Unfortunately, your sales numbers were among some of the company’s lowest.

Employee: Who else is being laid off?

Manager: I can’t share this with you at this time, since we are still in the process of communicating the layoff message to affected individuals. We want to be careful that all affected employees hear the news from us, and not a co-worker or the rumor mill.

Employee: Who’s going to do my work?

Manager: Your work will be divided among the remaining employees.

Employee: I’ve been here for 10 years. Doesn’t that count for anything?

Manager: While a lack of seniority can be used as a factor upon which to base a layoff, it’s not the only factor. Since the company desperately needs to attract new customers, our decision was based primarily on interpersonal skills. In instances where two or more employees ranked equally, we considered past performance.

Employee: All of my past reviews have been favorable. How can you lay me off?

Manager: Being selected for layoff in no way implies that you were a poor performer. It simply means that when we looked at the performance of everyone, some were better suited to meet the specific performance needs of the company going forward.