

Avoiding a Workplace 'Rashomon'

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There's an old saying that perception is reality. When it comes to employees who believe they've been targeted for retaliation -- whether it's true or not in fact -- that is their reality. Take care: Their perception could also become a jury's reality and a legal nightmare for your company.

Thus the underlying principle that human resources professionals should bear in mind is that human beings always act on their perceptions, and not necessarily on the facts. This is especially true after an employee has filed a formal complaint about inappropriate conduct in the workplace environment. This always poses a thorny situation for employers, and, if handled inexpertly, could lead to disastrous consequences. If the disgruntled employee is left to feel isolated by the company, or -- worse -- feels subjected to an adverse employment action too soon after the complaint is made and investigated, he or she is likely to seek legal representation and sue.

Yet a lack of communication is almost always the culprit in alleged retaliation claims. There is often a real disconnect between employees who have made complaints and those who represent management. And what tends to happen is that the employee contacts an attorney as a first resort, rather than going to their human resources representative. Still, with a few relatively easy steps, HR professionals can bridge this communication gap and greatly reduce the risk of litigation.

- Follow up quickly. Don't isolate or ostracize the employee. It's essential that HR personnel not only advise employees of their anti-retaliation policy, but actually follow up with employees who have made complaints to ensure no retaliation has occurred. This includes engaging witnesses who provided information during any investigation of the complaint.
- Conduct a reality check. Probe the complaining employee to determine, to the extent possible, whether the employee perceives retaliation has occurred as a result of his or her complaint. Any follow-up discussions with the employee should be carefully documented.
- Give assurances. Encourage the employee to come forward with any perceived retaliation complaints and assure the employee that such complaints will be taken up seriously and investigated.
- Keep following up. Don't assume you've covered yourself by conducting just one follow-up with the employee. Make it a point to check in with the employee to reinforce your messages, to document perceptions and to determine if there are any new developments. You should attend to the situation periodically for approximately two to three months after the complaint is lodged.

In the current legal environment, managing disputes professionally is more important than ever. In August, the California Supreme Court clarified -- and in some ways expanded -- the legal limits of retaliation claims in the case of *Yanowitz v. L'Oreal USA, Inc.* The plaintiff, a regional sales manager, refused to carry out an order from a male supervisor to terminate a female sales associate who, in the supervisor's view, was not sexually attractive or "hot" enough. In reaching their decision, the California justices noted they had conducted a survey of similar decisions in other states and ruled that adverse employment action could be broadened to encompass decisions less extreme than termination or demotion. The court ruled that under California law, an employee's refusal to follow a supervisor's order that she reasonably believes to be discriminatory is a legally protected activity even if the employee does not explicitly state as such.

Going further, they ruled an adverse employment action, in the context of a claim for retaliation, includes "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." The "entire spectrum" could include things like

actively soliciting negative feedback about the complaining employee, criticizing the employee's job performance or refusing to allow the employee the opportunity to respond to charges leveled against her, as was the case in Yanowitz. In addition, the court held that the "totality of the circumstances" will be considered in assessing whether any adverse employment actions have occurred.

This is grim news for employers and all the more reason to be proactive. A retaliation claim may be brought by an employee who has brought attention to or opposed conduct that the employee believes to be discriminatory or harassing, even if the conduct is not illegal as a matter of law. Thus, an employer that retaliates against an employee whose underlying complaint of harassment or discrimination cannot be legally proven can still be held liable for retaliation.

The employer that initiates adverse action against an employee too soon after the employee has lodged a complaint -- regardless of the justification for the adverse action -- is treading on very thin legal ice. It may look suspicious to jurors if an employee has been terminated or suffered other types of adverse conditions not long after raising a complaint of improper conduct, especially if the employee has no prior documented performance problems.

But these problems can be avoided if they are handled well. With follow-up after investigations, reality checks, documentation and knowledge of the law regarding retaliation, employers can save themselves the expense and difficulty of defending a retaliation lawsuit.

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