

Don't get caught in the legal wringer when dealing with difficult-to-manage employees

By Robin E. Shea

Retaliation is one of the hottest areas of employment litigation. More than 27 percent of all charges filed with the EEOC in 2001 were retaliation charges. Unfortunately—and probably not coincidentally—retaliation claims also are among the hardest for employers to prevent. Dealing with an employee who has engaged in protected activity and also has attitude or performance problems can be one of the biggest challenges facing even experienced, seasoned managers. In legalese, unlawful retaliation exists when three things happen:

1. An employee engages in legally protected activity.
2. The employee suffers an adverse employment action.
3. “A causal nexus” exists between the protected activity and the adverse action.

In plain English, this means that:

1. Your employee either tried to blow the whistle on your company for doing something he perceived to be illegal, or he filed an EEOC charge, a workers' compensation claim, a safety complaint or a lawsuit against the company.
2. You fired, demoted, failed to promote, or cut the pay of that employee.
3. You took your actions in step No. 2 because of what the employee did in step No. 1.

There are two main reasons why retaliation claims form such a large chunk of all employment litigation. First, an inordinate number of people are entitled to file these claims because there are so many activities that are “legally protected.” These include race or other discrimination charges, disability accommodation requests, requests for leave under the federal Family and Medical Leave Act, workers' compensation claims, workplace safety complaints, sexual or other harassment complaints, and wage and hour complaints.

Most federal and state employment laws contain anti-retaliation provisions. The laws protect charging or complaining parties as well as those who testify on their behalf. As long as these individuals act in good faith, they are protected—whether or not they are actually right. Many of these laws also protect former employees. For example, an employer who gives a bad reference for an ex-employee because that person filed a charge could be liable for retaliation.

The second reason for the large number of retaliation claims is the difficulty employers have in dealing with people who have engaged in these types of activities. It is hard to be constructive in all of your dealings with an employee who has filed a charge against your company or against you personally.

To complicate matters further, the employees who engage in protected activity often (but not always) are your chronic complainers, grippers and “troublemakers.” It is human nature to have trouble dealing with such individuals, yet anti-retaliation laws require almost superhuman restraint.

On the theory that understanding a problem is the first step in overcoming it, let's look at the dynamics in a fictional but typical retaliation scenario:

Protected activity. Seymour, a mediocre employee, files an EEOC charge of sex discrimination after co-worker Glenda beats him out for a promotion. Seymour alleges that Glenda got the promotion because she was sleeping with the boss. Although Seymour honestly believes this “must” be the reason he lost the promotion, he has no evidence to support the claim. The EEOC advises Seymour that his employer cannot take action against him for filing this charge. Seymour brags to his co-workers about the charge and says he is making things “very uncomfortable” for Glenda.

Anger/fear of inspiring new protected activity. Seymour's co-workers, in turn, begin to feel uncomfortable around him. Because he was willing to file a charge against the company, they reason, he might file a charge or make embarrassing allegations against one of them. They also believe he has been unfair to Glenda. Glenda, for her part, is aware of the charge and worries about the impact it may have on her career. She also is afraid to do anything that might bring on additional charges from Seymour. Finally, she is understandably hurt, embarrassed and angry at his allegations.

Avoidance. Glenda knows she cannot legally take any action against Seymour for making her life miserable. She can't be nice to Seymour because she is too angry with him, and she can't be mean to him because of the law. She is trapped—and so she makes her first mistake. She does the only thing a reasonable person in her position would do—she avoids him. She avoids personal contact with him, avoids giving him assignments and certainly avoids giving him constructive feedback about his performance and workplace behavior. Seymour's co-workers do likewise.

Pushing the boundaries. Although Seymour bristles a little at being avoided, he soon realizes he has it made. If he misses a deadline, Glenda asks a co-worker to finish the job. If he smarts off to Glenda or co-workers, they walk away. If he spends the workday shopping on e-Bay or talking to his lawyer about the lawsuit he intends to file against the company, they let it go. Because no one calls Seymour on his behavior, he begins pushing the boundaries even more.

Increased avoidance/excessive tolerance. The more he pushes, the more Glenda and his co-workers are intimidated and back away from him. They also tolerate increasingly poor performance and bad behavior on his part. Their tolerance spurs Seymour to push the boundaries even further, in turn causing more avoidance and tolerance and so on.

Resentment. Although Glenda and Seymour's co-workers appear calm and aloof on the surface, increasing rage is simmering below. They cannot repress their true feelings forever, no matter how much they try. The co-workers also begin to become impatient with Glenda, despite their sympathy for her, because they perceive that she is letting Seymour get away with murder.

The trigger. Seymour commits an infraction. It may be a relatively minor one, or one for which he has a legitimate explanation. In any event, because of the stress that has been building among Glenda and Seymour's co-workers, this infraction leads to ...

The explosion. (This stage also can be referred to as "being human.") Someone *retaliates* against Seymour. It could be a co-worker, or it could be Glenda. But the result is that Seymour is punished out of proportion to his actual offense, perhaps even being terminated for behavior that would result in no more than a warning if a co-worker had committed the same behavior.

There are also variants of the "disproportionate punishment" theme. Perhaps the co-workers harass or play a vindictive trick on Seymour while Glenda looks the other way. Or perhaps Seymour really does deserve to be fired, but because everyone was afraid to approach him until they became fed up, there is no supporting documentation in his file (thus, leaving the door open for him to allege that he was fired in a retaliatory manner).

This brings us back to the beginning of the cycle. Based on the "explosion," Seymour accuses the company of retaliating against him for filing his earlier sex discrimination complaint. And if the action was disproportionate, unduly cruel (at least, when viewed out of context) or insufficiently documented, he may have a good case.

The scariest aspect of the above scenario is that it could so easily happen to anyone. Managing an employee who has engaged in legally protected activity takes courage and resolve. But it can be done legally and correctly. Here's how to break the cycle.

The scenario above went wrong not when Seymour filed his charge, but when Glenda failed to deal honestly with his performance and attitude problems and chose instead to avoid him and tolerate his inappropriate behavior. Early on, Seymour did plenty to warrant disciplinary action: He missed deadlines, goofed off and was belligerent to co-workers. Glenda easily could have taken action against him for these infractions, consistent with company policy and practice.

It pays to remember that the law requires a "nexus" between the protected activity and the adverse employment action. In practical terms, that means that it is legal to take action against a protected employee for any reason other than a retaliatory one. What this means—and what we all have such a difficult time doing—is treating protected employees just like anyone else. We *should* give work assignments to an employee who has engaged in protected activity. We *should* hold that employee to the same standards as other employees. This is the only viable choice the law allows.

That doesn't mean it is an easy choice. In fact, it is incredibly difficult, given that the employee has already filed one charge against you and is likely to file another as soon as you confront him. However, there are two strategies that should make this task easier:

Let the employee's psychology work for you. It is very difficult for a person to continue working for a company against which he has filed a charge. Although it is hard for

employers to keep a level head in such situations, it helps to know that the “protected” employee has his own set of challenges. Most agencies will advise the employee that he or she cannot be terminated for engaging in protected activity. But what many employees hear is, “You cannot be fired—period.”

As a result, these employees often adopt a false sense of immunity that ultimately works to their disadvantage. They begin to do stupid things, including skipping work, refusing reasonable assignments, falsifying records, engaging in violent or verbally abusive altercations with supervisors or co-workers—in short, committing clear-cut, termination-on-first-offense infractions. Although it obviously would be wrong to terminate an employee for a retaliatory reason, the above types of infractions can and should be acted upon if they occur.

Examine your conscience. Retaliation cases normally stand or fall based on the manager’s motivation. Thus, to make sure you’re on solid legal ground, ask yourself the following questions before taking action against an employee who has engaged in protected activity:

- Is there a written attendance, behavioral or performance standard that the employee violated?
- What is the company’s actual practice with respect to such violations?
- How would I treat my *best* employee if he or she violated this standard? (This one, answered honestly, is probably the key to assessing the purity of one’s motives.)
- Is the proposed action supported by policy, practice and appropriate documentation?
- If the issue is a “gray” one (examples might include substandard performance or poor attitude), do you have sufficient, specific and objective data on which to rely?

Obviously, it also does not hurt to get an unbiased opinion from someone who has not been putting up with this employee for months, as you have.

Author’s note:

This article should not be construed as legal advice or as pertaining to specific factual situations.

Robin E. Shea is a managing member with the Winston-Salem, N.C., office of Constangy, Brooks & Smith LLC, a labor and employment law firm representing management since 1946.