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Employers, Prepare for a Legal Battle: Sometimes Prevention is not Enough to Counter Retaliation Claims

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Employers should be aware that in 2020, retaliation claims will likely represent one of their greatest legal risks. In the past decade, retaliation filings have rapidly increased and now make up the lion's share of claims filed in employment-related lawsuits and administrative charges. For instance, a 2018 U.S. Equal Employment Opportunity Commission (EEOC) report revealed that nearly 50 percent of all filed charges include retaliation claims.

Retaliation claims are similarly common in the Utah Labor Commission. The reason for this dramatic increase is the difficulty in preventing and defending these claims. But employers are not defenseless. As caselaw continues to evolve in this area and courts wrestle with new factual circumstances and distinctive legal arguments, the contours of what constitutes actionable retaliation continues to be clarified and defined. One such recent case is *Payan v. UPS* (10th Cir., Nov. 25, 2019). Before addressing the details of that case, let's briefly review retaliation claims.

The right to bring a retaliation claim stems from state and federal discrimination laws, such as Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), so-call “whistleblower” protections and other laws that protect activity. It's safe to say that almost every major employment law contains a provision that protects employees from adverse employment actions taken in reprisal for the exercise of rights.

There are three basic elements to a retaliation claim. Retaliation occurs whenever 1. An employee or applicant engages in protected activity, 2. The employer takes adverse action and, 3. There is a causal connection between the two actions.

In the context of the EEOC, “protected activity” falls into two categories: participation and opposition. The first is when an individual “participates” in an equal employment opportunity process, including filing a charge, being involved in an investigation or testifying or serving as a witness in a proceeding or hearing. The second is when an individual opposes any discriminatory practice, which can include complaining about and questioning the practice. Employees have the right to engage in both types of protected activity without being subject to an adverse action from their

employer.

“Adverse action” can take many forms. Some acts are clearly retaliatory (such as employment termination) while others are not so evident. The following actions, among others, can possibly be considered adverse: suspension, demotion, pay reduction, denial of a promotion or raise, job reassignments, missed training opportunities, less desirable work schedule, exclusion from various employment activities, a bad performance review and micromanagement. If a supervisor merely treats an employee differently as the result of protected activity, it could be retaliation.

Simply put, any action that has a negative impact on an employee's employment after engaging in protected activity is potentially retaliation. However, the final required element of a retaliation claim must tie it all together — there must be a causal connection between the protected activity and the adverse action.

Different types of evidence are considered in determining whether there is a causal connection, including:

- Suspicious timing, especially when the adverse action occurs shortly after the individual engaged in protected activity.
- Inconsistent or shifting explanations, such as the employer changing its stated reasons for taking the adverse action.
- Treating similarly situated employees more favorably than the individual who engaged in protected activity.
- Statements or other evidence that suggest the employer's justification for taking the adverse action is not believable, was pre-determined or is hiding a retaliatory reason.

Ultimately, the dangers of retaliation claims lie mainly with two underappreciated factors. First, employees can bring retaliation claims regardless of whether their initial discrimination claims have any merit. And second, these claims can be brought years after the initial discrimination complaint is resolved.

The recent 10th Circuit case of *Payan v. UPS* is an excellent example of the dangers of retaliation claims and the precautions that employers should take to position themselves to fight once a lawsuit has been brought.

Payan worked for UPS and in 2009, his new supervisor conducted his semiannual quality performance review and rated Payan as “development needed.” Payan felt his performance review was motivated by racial discrimination. He complained to human resources and eventually filed a complaint with the EEOC. In 2014, the EEOC issued a Right to Sue Notice. Payan then sued UPS and his supervisor for racial discrimination, retaliation and various other claims. UPS moved for summary judgment, which the district court granted and dismissed Payan's claims. Payan appealed and the 10th Circuit affirmed. UPS breathed a sigh of relief.

However, while Payan's 2009 discrimination and retaliation claims were

pending, Payan became a business manager in UPS's Wasatch Center. His responsibilities included ensuring that drivers satisfied UPS's time, safety and production requirements. He also oversaw several UPS supervisors. In late April 2015, Payan's supervisor was informed that Payan was instructing others to alter their time cards to add lunch breaks that were never taken or to adjust employee timecards to avoid overtime. UPS conducted a preliminary investigation into the time card allegations, which findings then led to a formal investigation that ultimately confirmed the allegations against Payan. In the end, it was determined that Payan violated UPS policy and that discipline was warranted. The discipline included not giving Payan a raise or company stock.

After receiving UPS's disciplinary decision, Payan again sued UPS and a few individual employees for retaliation, alleging the 2015 investigation and disciplinary decision were not related to the allegations of timecard manipulation but instead were pretextual retaliation for his engagement in "protected activity" by suing UPS several years prior. UPS again moved for summary judgment, which the district court granted, finding that Payan failed to show that UPS's legitimate reason for disciplining him was pretext for retaliation. Undeterred by the district court's decision, Payan appealed to the 10th Circuit, arguing that UPS's disciplinary decision was pretext because UPS 1. offered inconsistent or implausible justifications for his discipline, 2. deviated from company policy and protocol, and 3. engaged in disparate treatment of similarly situated employees. The 10th Circuit found all of Payan's arguments unpersuasive and affirmed the district court's summary judgment in favor of UPS.

For employers in the thick of a retaliation lawsuit, *Payan v. UPS* provides important lessons on how to prevail against a retaliation claim and avoid going to trial.

Employers must:

1. Provide a clear explanation for disciplinary decisions.
2. Not disclaim or abandon initial explanations for disciplinary decisions, though an employer can add additional details about the basis of discipline.
3. Not act contrary to a written company policy, an unwritten company policy or a company practice when making the adverse employment decision. Deviation from policies and procedures can be used as evidence of pretext. Do not deviate from established procedure or protocol.
4. Make sure disciplinary action is consistent with past discipline of other similarly situated employees who engaged in similar conduct.

As seasoned HR professionals know, even the best practices cannot perfectly insulate an employer from retaliation claims. Creative plaintiffs always seem able to conjure theories of unfairness or pretext. Good practices, including those discussed above, position employers to successfully defend retaliation claims as UPS did in the multiple cases filed against it by Payan. We encourage employers to examine their policies, practices and training to ensure they are positioned to battle the retaliation

claims that will likely come.

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