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DOES AN EMPLOYEE WITH A COMPLAINT HAVE A "LICENSE TO MISBEHAVE"?

By Richard L. Steer

As attorneys who routinely defend and counsel employers in connection with claims of sexual harassment and employment discrimination, we have seen it time and time again—a poor performer, on "thin ice" already, goes to management and claims to have been sexually harassed or discriminated against by a supervisor. Thereafter, the employee (and sometimes management) believes that the employee is "untouchable," free to perform poorly or engage in breaches of company policies with impunity. We sometimes see a similar attitude when an employer reinstates an employee in order to settle a discrimination or harassment claim. Experiences like those discussed above make it crucial that employers, their supervisors, and insurance adjusters handling employment practices liability cases have a thorough understanding of the legal principles surrounding retaliation claims and appreciates the need for early and accurate documentation of misconduct.

State and federal laws protect employees against company retaliation for complaints about discrimination or harassment, or for participating in company or government investigations or hearings regarding these matters.

Retaliation cases often turn on timing. An employer that can prove that it was already contemplating the employee's termination, or other discipline, before the discrimination complaint was made, has a much better chance of beating back a retaliation case than an employer who lacks such proof. E-mails are particularly important in this regard as they automatically document the dates in question. Performance improvement plans that specifically mention the possibility of termination, if itemized misconduct is not corrected, are also often an important part of the employer's proof.

The rules concerning when unlawful retaliation has occurred have recently changed. In a U.S. Supreme Court case1 decided this past June, the Court ruled that illegal retaliation only occurs when an employer takes an action that a "reasonable employee" would have found to be "materially adverse." An employer's act is considered "materially adverse" under this ruling, where it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Although retaliation may be found under this standard, even in the absence of a termination or demotion, it is clear that petty slights, minor annoyances, and a simple lack of good manners should not form the basis of a legally successful retaliation claim.

When handled properly, a claim of harassment or discrimination should not be a license to misbehave in the workplace.

About Richard L. Steer, Partner

Richard L. Steer is a partner at Tarter Krinsky & Drogin LLP. He has defended a wide range of employers, insurance companies and their policyholders in employment litigation and has extensive experience in Employment Practices Liability insurance, labor relations, and restrictive covenant disputes. In addition, Rich is an Adjunct Professor of Law at Pace University School of Law, where he has taught courses in employment discrimination law, employment law, and labor law for over 20 years. Rich can be reached at rsteer@tarterkrinsky.com.