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How To Minimize Retaliation Claims During The Termination Process

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Last week, the EEOC recently released its [enforcement data for Fiscal Year 2015](#). Unsurprisingly, retaliation claims continue to rise and made up nearly 45 percent of all charges filed. This statistic is unsurprising given the relative ease it is for an employee to assert a claim. In most jurisdictions, the employee must only show he or she made a good faith complaint about an employment practice such as discrimination or harassment and, shortly thereafter, the employee suffered some form of adverse employment action such as a termination.

Retaliation cases are more difficult for employers because of the “good faith complaint” standard – the employee only needs to demonstrate she reasonably believed she was being harassed or discriminated against because of a protected characteristic. The employee is not required to demonstrate the requisite elements of harassment or discrimination in order to proceed with a retaliation claim. Often times, we see retaliation claims brought following a termination and, unfortunately, employers face difficulties in defeating those claims because the termination process did not include a review of issues raised by the employee within the past few years.

To minimize retaliation claims in connection with terminations, employers should consider examining:

Has the employee raised a formal or informal complaint of discrimination or harassment? If so, when was the complaint raised?

The temporal proximity of the complaint and the termination is critical in defending against a retaliation complaint. Courts generally have held that

when there is more than a year between the time of the complaint and the company's decision to terminate, the less likely retaliation is a motivating factor for the decision.

If the employee made a complaint (formal or informal), did the complaint involve one of the decision-makers recommending termination?

If the complaint involved one of the decision-makers, the employer should examine whether the individual recommending termination is motivated for reasons that may be perceived as retaliatory.

Has the company terminated other employees who have not raised complaints for the same or similar reasons surrounding this termination?

Consistent treatment is key in defending against retaliation claims and, if there is a deviation from the employer's practices, a justification needs to be proven.

What do the documents look like?

So many times an employer proceeds with a termination for "poor performance" or "ongoing performance issues" when the documentation tells a different story. The more the documentation matches the employer's stated reason for termination, the easier the defense of a retaliation case is.

By asking these questions and reviewing the documentation prior to termination, employers can potentially minimize retaliation claims and reduce the risk of becoming a growing statistic with the EEOC.