

Insights

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How Unresolved Complaints Escalate in to Retaliation Lawsuits

A recent Seventh Circuit case reminds us that employers should make sure to let employees know how their complaints have been resolved. Title VII prohibits sexual harassment and retaliation against an employee who complains of harassment – even if it turns out the behavior isn't illegal. When the supervisor, who takes the complaint, resolves the matter but doesn't let the employee know, the employee may complain again this time to the supervisor's supervisor about how the matter was handled. Under Title VII, the second complaint is also protected and the U.S. Court of Appeals for the Seventh Circuit held that a supervisor may not retaliate against an employee for making the second complaint. *Magyar v. St. Joseph Regional Medical Center*, No. 07-2197 (7th Cir. 9/12/08).

Sexual Harassment

A few months after Magyar started the job, a 52 year old male co-worker sat on her lap and whispered "you're pretty." It was the second time the co-worker sat on her lap and made such a comment. Magyar testified that she thought it was just a one-time occurrence and that she didn't know what to do because it was her first "real" job.

Magyar reported the second incident to her supervisor, the head of surgery services. When the supervisor refused to talk to the co-worker unless Magyar filed a formal complaint, Magyar told the supervisor she had been sexually harassed in the past and was sensitive to the behavior. The supervisor agreed to speak with the co-worker and apparently did so later that day. Court records indicated that the co-worker wanted to apologize but the supervisor advised against it.

Lack of Follow Up

The supervisor never let Magyar know what happened. Magyar never heard how the complaint was dealt with. Then, approximately six weeks later, Magyar complained to the hospital's corporate counsel. In response, the supervisor was instructed to meet with Magyar but the meeting digressed when the supervisor pressed Magyar about why she complained to the corporate counsel's office. Two days later Magyar saw a posting for her job and wrote to the corporate counsel complaining of retaliation. Magyar told them she was also upset and that she needed to reveal her assault to get her supervisor to act. Eventually her job was restructured and Magyar was terminated.

Lessons to Be Learned

There are a number of lessons here, not the least

of which is to notify employees about how their complaints have been resolved. It also would have been important for the hospital's corporate counsel to ensure that the supervisor did not retaliate against Magyar when the second complaint was raised. Finally, any posting or revision of an employee's position, particularly one who has made a complaint of harassment, should be reviewed carefully by corporate counsel.

While the facts of this case are important, the general theme is even more so – employees continue to be protected after making follow-up complaints and are entitled to protection from retaliation at that time and into the future. In addition – let the complainant know what has resulted from his/her complaint.

Minnesota Supreme Court Ruling Adds to Sexual Harassment Risk

A Minnesota Supreme Court decision this year made it easier for employees to hold their employers liable for sexual harassment. For the first time, the MN Supreme Court has ruled that sexual harassment cases brought under the MHRA should follow the rules laid out for Title VII sexual harassment cases. The decision means employers can do very little to escape liability if a supervisor harasses a subordinate and then takes or threatens to take an adverse employment action against the employee. The employee who says she was harassed doesn't have to prove her employer knew or should have known about the harassment and failed to take timely and appropriate action. Thus, given this decision, it simply doesn't matter that you have a great harassment policy or complaint procedure; it means that HR must now carefully investigate any and all adverse employment decisions and formally approve them in advance. No longer can an employee rubber stamp a supervisor's discipline decisions or decisions regarding demotions, promotions and terminations. All such changes should be based on objective factors. *Frieler v. Carlson Marketing Group*, No. A06-1693 (S.Ct.MN 2008)

Federal Contractors Required to Use E-Verify System

Starting January 15, 2009, federal contractors and subcontractors will be required to begin using the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system to ensure that their employees are eligible to work in the United States.

On June 6, President George W. Bush signed an executive order requiring federal contractors and subcontractors to use E-Verify to confirm the employment eligibility of all persons hired during a contract term and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States. Enforcement of the executive order was delayed due to concerns about how E-Verify would work.

The final rule outlining what is necessary to comply was published in the Federal Register on November 14, 2008. According to the USCIS, all federal contracts awarded and solicitations issued after January 15, 2008, must include a clause requiring federal contractors to use the E-Verify system. The same clause will also be required in subcontracts that amount to more than \$3,000 for services or construction. Contracts exempt from this rule include those that contract for less than \$100,000 for services or construction, and those with performance terms of less than 120 days.

Companies awarded a contract with the federal government will be required to begin using the E-Verify system within 90 days of enrollment to confirm that all new hires and their employees directly working on federal contracts are authorized to work in the United States. Contractors will also have 30 calendar days after the initial enrollment period to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered federal contract.

More than 92,000 employers currently use E-Verify, a free Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration. During fiscal year 2008, more than 6.6 million employment verification queries were run through the system, representing one out of every eight hires made in the United States.

E-Verify has had problems and civil rights groups have raised concerns that its use has led to many U.S. citizens not being able to work because of clerical errors and other administrative issues. There is also a concern that widespread use of the system could lead to employers engaging in national origin discrimination.

Government Forms and Posters

Helpful government agencies have indicated that employers do not need to pay for most forms and posters that they are required to use and post in their workplace. These documents are typically available for free through government websites. Websites ending in ".gov" are the only official government sites. Some private companies try to sell government documents using official-looking websites. You can download most required federal posters free at the U.S. Department of Labor's main poster page, www.dol.gov/ofbp/fbrefa/poster. Download mandatory Minnesota posters at www.doli.state.mn.us/posters.html.

Clean Up Your Old Handbook

If you haven't reviewed your handbook recently, this may be the time to do so. In an 8th Circuit case, a female bank employee won her equal pay action (EPA) lawsuit that claimed a male worker earned more for doing the same job. She was able to earn double damages by proving the discrimination was "willful".

How did this happen? The bank's employee handbook, which hadn't changed in years, included a policy that addressed scheduling problems of "ladies with children going to school," and it specifically couldn't be used for maternity leave. While it is unlikely that your policies read this way, it is important to review each and every policy carefully and ensure that they are updated based on current legal standards. *Simpson v. Merchants and Planters Bank*, 441 F.3rd 572 (8th Cir. 2006)

How Long is Too Long to Perform a Drug Test?

The Minnesota Drug and Alcohol Testing in the Workplace Act (MDATWA) lets an employer test employees for illegal drugs if the employer believes they have suffered a work injury. The question is, how long after the injury can you perform a drug test? In a recent case, Harris hurt his back working at the Apple Valley Wal-Mart. He didn't fill out an accident report. Several months later, when he was on leave, he requested workers' compensation. The store then insisted he take a drug test. He refused and was fired. He sued, claiming that asking for the test two months after the accident was arbitrary and violated the MDATWA. The court said "no" after Wal-Mart showed evidence that tests for Marijuana can reveal drugs up to 77 days after its use. *Harris v. Wal-Mart*, No. 07-119, D.C. Minn.

USERRA Enforcement and Reporting Amendments

In October 2008 Congress passed the Veterans Benefits Improvement Act, which amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) to reform the complaint process and to expand the U.S. Department of Labor's (DOL) reporting requirements regarding its enforcement of the law.

The Amendments allow a service member to file a complaint with the DOL alleging violations committed by an employer. The Department then investigates and determines whether a violation occurred. If it determines the employer violated the law, it will attempt to rectify the wrong but then may recommend that the U.S. Department of Justice file suit against the employer on behalf of the service member.

The Amendments also require the DOL to inform the service member in writing of his rights within five days after a complaint is filed, to complete the investigation in 90 days, and, after the investigation has been completed, to provide the results, again in writing, to the service member. Upon request and "when appropriate," the Department must also provide technical assistance to the employer.

The Amendments specifically state that no statute of limitations will apply with regard to allegations made under the statute. Accordingly, records with regard to how an employee's absence for military service and return from service are handled should be maintained indefinitely.

DOT Issues Disturbing New Rules Regarding Drug Testing

In a recent announcement published in the *Federal Register* by the U.S. Department of Transportation (DOT), the agency acknowledged its obligations under the Omnibus Transportation Employee Testing Act of 1991 to protect employee privacy "to the maximum extent practicable" and warned of "increasing proliferation" of products and substances that assist workers to "defeat drug tests." In view of the "greater availability" a device is allowing employees to cheat on tests, the DOT issued new requirements effective November 1, 2008, affecting employee privacy.

At issue is the threat of employees using substances or devices in the process of providing a urine specimen that would allow them to evade the test. The new rules require, as of November 1, 2008, employers to use a direct observation method whenever employees are returned for a follow up test or return to duty test and require that the employee lower his pants and underwear to confirm that he isn't using an evasive device. If the employer is not covered by the DOT but they use drug tests for safety or other reasons, they should be aware of the growing problem of avoidance. Many such devices are apparently available on the Internet as well as in local shops. Employers should always seek advice of counsel when considering this delicate issue of balancing test integrity with employee privacy. That will not be easy when employers lack the mandatory powers of the DOT.

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January Employment Law Seminar ***Training Your Supervisors on How to Deal With*** ***Promotions, Demotions, and Terminations***

Join us as we discuss how to train your supervisors on dealing with ADA(AA), FMLA, and other employment-related issues on how to make and document any and all reasons for employment decisions.

WHEN: Thursday, January 21, 2009
11:30 to 12:30 p.m.

COST: Free (lunch provided)

WHERE: Lower Level of the Colonnade Building
Conference Room C
5500 Wayzata Boulevard
Minneapolis, MN 55416

For Reservations, email or call Shelly at sgilbert@bernicklifson.com or 763-546-1200

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