

## **PERSONNEL POLICIES**

### **The delicate art of managing complainers**

*Complaints are a common part of work. In fact, some employees rely on complaining as a routine form of communication. If they aren't complaining, that can mean there's something really wrong. It presents a considerable challenge, however, for supervisors to deal with complaints while at the same time demanding good performance from their employees.*

#### ***Hidden dangers***

One of the reasons that handling complaints is so challenging is that when a supervisor demands performance or imposes discipline, the potential exists for a complaining employee to assert that he's the target of retaliation. When discipline rises to the level of firing, supervisors may come face to face with the realization that our courts recognize a claim when a discharge is in retaliation for asserting a right that's consistent with public policy. Case law demonstrates that that can happen when employees complain about such things as wages, staffing, or safety, for example.

In a sense, employees who make complaints that can be linked to a public policy put their supervisors in a difficult position. How can a supervisor persuade the employee, the company, a court, or jurors that the complaint wasn't a factor when imposing discipline or demanding performance? It's a delicate situation to be sure, but there are some things that you can do to help.

#### ***Steps to take in hearing complaints***

Typically, immediate supervisors are the first to hear complaints, and they're the ones faced with the responsibility of imposing standards of performance or conduct. They're going to have to explain decisions that ultimately might lead to the discharge of an employee who had previously complained. To take some of the burden off those supervisors, if resources permit, assign the task of following up on complaints that may be linked with public policy to someone else within the company. That will allow the supervisor to continue to focus on managing the employee while the other person takes care of investigating the complaint and ensuring that appropriate follow-up has resulted.

Another step that can assist supervisors is to remind them that they should hold the complaining employee to the same standard of conduct and performance as others; assure them that so long as they do that, support from the company will be there. A supervisor

must be confident that the company won't undercut her efforts because of fear that a complaining employee is contemplating litigation. The flip side of that coin is that the supervisor must understand that there should be no relaxation of standards for the complaining employee.

A third step that can help supervisors is to refresh their training on documentation. Specifically, they need to be told the following:

- Performance reviews and documentation of disciplinary issues should be done thoroughly and carefully. Comments should be as objective as possible, and they should be supported by specific examples.
- If a performance review calls for comments regarding an employee's attitude, particular care must be taken. Supervisors should avoid citing the fact that the employee has complained as a basis for finding that the employee has a poor attitude.
- The idea is to avoid singling out the complaining employee for unequal treatment, so the supervisor should be cautioned that any heightened attention she gives to documentation should be applied to all employees, not just the employee who complained.

There's still one more thing that can be done to deal effectively with situations in which employees complain: Investigations and follow-ups should be done promptly, and the complaining employee should be informed in writing of the result. That will accomplish two things for you: (1) to the extent that the problem identified by the employee in his complaint was a legitimate concern, it can be dealt with, and (2) prompt closure will tend to limit the span of time in which an employee can effectively argue that his firing is linked somehow to the complaint.

**Q:** When can we discipline or fire an employee who has complained about discrimination or harassment?

**A:** You risk a retaliation claim whenever you take any adverse action against someone who complained about discrimination or harassment (as well as many other substantive complaints). The EEOC has set forth the following standards:

- You can't take adverse action against an employee because he threatened to file a charge or other formal complaint, actually complained about alleged discrimination or harassment against him or others, refused to obey an order because of a reasonable belief that it was discriminatory, or requested an accommodation because of his disability or religious belief.
- An employee's "opposition" need only be based on a *reasonable good-faith belief*.
- Someone who claims she suffered retaliation doesn't necessarily have to be the person who opposed your practices in the first place. For example, you can't retaliate against an employee because her son, who's also an employee, opposed allegedly unlawful employment practices.
- You needn't have engaged in the practices the employee opposed. For example, the EEOC would find a violation if you refused to hire someone because you were aware she opposed her previous employer's allegedly discriminatory practices.
- An employee's complaints about your practices are protected activity, regardless of whether his allegations are valid or reasonable.
- You can also be liable for retaliating against *former* employees. For example, you can't give an unjustified negative job reference, refuse to provide a job reference, or inform a prospective

employer about a former employee's protected activity. A negative job reference about someone who engaged in protected activity doesn't necessarily constitute unlawful retaliation, however, unless it was based on a retaliatory motive. Retaliatory acts designed to interfere with a former employee's prospects for employment are unlawful regardless of whether they cause another employer to refrain from hiring him.

As you can see, you must be careful when taking adverse action against an employee who has complained about discrimination or harassment. You can discipline her if your actions are unrelated to her complaint or if she acted in bad faith when she complained. If you take action because of an employee's bad faith, you should have some corroborating evidence of it — for example, her own admission or a witness who refutes

*[South Carolina Employment Law Letter](#) written by attorneys at [McNair Law Firm, P.A.](#)*