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Best Practices for Recognizing & Preventing Discrimination & Retaliation in the Workplace

By Bruce Garrett & Marley Masser

Many employers are surprised when they learn that an employee, former employee, or applicant has accused them of discrimination or retaliation. Many discrimination and retaliation charges are brought by former employees who were terminated after a tumultuous end to their employment. Employers are sometimes shocked because the employee was terminated due to legitimate, non-discriminatory and non-retaliatory reason. But, in defending these suits in court or in administrative proceedings, the employer's good intentions and legitimate motivations are only as strong as the evidence that supports them.

While employers cannot completely escape the threat of being sued for discrimination or retaliation, they can limit their potential liability and ensure the charges are easier to defend. To do so, employers should review and understand the anti-discrimination and anti-retaliation laws, adopt strong anti-discrimination and anti-retaliation policies, and scrupulously document employee performance or conduct issues that may lead to discipline or termination.

Discrimination

It is illegal to fire, demote, discharge, or otherwise subject an employee to an adverse employment action because the employee is a member of a protected class. Generally speaking, an employer cannot:

- Subject an employee to an adverse employment action on account of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (18 or older under Oregon law), disability, or genetic information.
- Allow harassment by managers, co-workers, or others in the workplace, because of race, color, religion, sex, national origin, age, disability, or genetic information.
- Deny a reasonable workplace accommodation that the employee needs because of a religious belief or disability.

Treating employees in a protected class differently than other employees is referred to as "disparate treatment." In addition, there is a less obvious illegal employment practice known as "disparate impact." Disparate impact is an unintentional form of discrimination that arises when an employment or hiring practice negatively affects members of a protected class. For example, if an employer required all applicants for a job opening to be over six feet tall, this policy would have a disparate impact on the number of women who could apply for the job. To be legal, a policy or practice that has a disparate impact on members of a protected class must be legitimate, necessary, and job-related.

Retaliation

The same laws that prohibit discrimination based on protected characteristics also prohibit retaliation against individuals who oppose unlawful discrimination or who participate in an employment

discrimination proceeding. This right is commonly referred to as a "protected activity," and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for:

- Filing or being a witness in an Equal Employment Opportunity Commission (EEOC) or Oregon Bureau of Labor & Industries (BOLI) charge, complaint, investigation, or lawsuit.
- Communicating with a supervisor or manager about employment discrimination, including harassment.
- Answering questions during an employer investigation of alleged harassment.
- Refusing to follow orders that would result in discrimination.
- Resisting sexual advances or intervening to protect others.
- Requesting accommodation of a disability or religious practice.
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages.
- Invoking protected leave, such as family and medical leave, workers' compensation leave, or protected sick leave.
- Reporting or making a complaint in good faith that the employer has violated the law.

Best Practices

In discrimination and retaliation cases, the reason why an employee was subject to an adverse employment action is usually in dispute. For example, when an employee returns from protected leave and they are fired shortly thereafter, the employer might maintain that the termination was legitimate and related to job performance, but the employee may allege that the termination was connected to their invocation of protected leave. These disputes often result in a "he-said, she-said" scenario that are difficult to defend. By following a few basic steps, however, employers can better establish that their adverse employment actions are legitimate, non-discriminatory and non-retaliatory:

- Document, document, document! When an employee is not meeting job expectations or is otherwise having performance or conduct issues, employers should scrupulously and contemporaneously document the employee's shortcomings and all conversations between the employer and the employee concerning these issues.
- Have at least two people representing the employer in performance management meetings with the employee. Both employer representatives should take notes.
- Adopt a strong anti-discrimination policy and train managers and supervisors on the policy and the law.
- Promote an inclusive culture in the workplace by fostering open communication between employees and management, as well as an environment of professionalism and respect for personal differences.

- Establish neutral and objective criteria to avoid subjective employment decisions. Enforce policies uniformly and consistently. Be careful about granting "exceptions."
- Issue written warnings that clearly outline job-related deficiencies and do not refer to protected class issues.
- Give an employee written documentation that accompanies any adverse employment action. For example, if you terminate an employee, provide a written termination notice that outlines the specific legitimate reasons for why the employee is being fired.

Engaging with legal counsel to review employment policies and practices before problems arise is the best preventative measure to avoid being sued for an unlawful employment practice. Further, if an employer is considering taking an adverse employment action against an employee, especially if the employee is a member of a protected class or has engaged in protected activity, an employment law attorney can help the employer navigate the process to minimize potential legal exposure.

For questions related to discrimination, retaliation, or for any other employment matters, contact Barran Liebman attorney Bruce Garrett at 503-276-2175 or bgarrett@barran.com.