
New Retaliation Trends

By Lynne Eisaguirre

In Denver on April 24, 2009, a U.S. District Court jury awarded a former United Airline ramp-services supervisor \$3 million after finding that the airline retaliated against her because she complained of sex discrimination. Jennifer McInerney was terminated from her job at United in March 2006 after 12 years at the company. While United prevailed on the discrimination claim, they lost on retaliation. McInerney had asked for extra time off and an alternative job when she became pregnant with her son who was then born premature. While she used all her regular time off, she was denied additional leave without pay after her son was born disabled. McInerney claimed similar requests were granted to male ramp supervisors. When she was instructed to return to work and didn't, she was terminated.

This case illustrates something we always talk about in our workshops: retaliation claims are easy to make and easy to win especially if the plaintiff loses the underlying discrimination complaint. You need to make sure that your managers are trained in the subtleties of retaliation once a complaint has been filed. It's human nature to change your behavior once someone has complained about you, leading to exactly this kind of retaliation claim.

How common are discrimination and retaliation complaints?

They are still startlingly common, unfortunately. The U.S. Equal Employment Opportunity Commission (EEOC) received a total of 82,792 private sector discrimination charge filings last fiscal year. This is the

highest volume of incoming charges since 2002 and the largest annual increase (9 percent) since the early 1990s. The EEOC recovered \$345 million in monetary relief for job bias victims.

Race, Retaliation and Sex

In 2007, allegations of discrimination based on race, retaliation, and sex were the most frequently filed charges, continuing a long-term trend, but nearly all major charge categories showed double digit percentage increases from the prior year. The agency report speculated that the jump in charge filings may be due to a combination of factors, including greater awareness of the law, charging economic conditions, and increased diversity and demographic shifts in the labor force.

In 2007, retaliation was the second highest charge category (behind race) surpassing sex-based charges in total filings with EEOC offices nationwide. Since the EEOC became operational in 1965, race has been the most frequently filed charge. Issues such as pregnancy discrimination and sexual harassment also trended upward at both the EEOC and state and local Fair Employment Practices Agencies.

Pregnancy and Sexual Harassment

For example, during 2007, pregnancy charges surged to a record high of 5,587, up 14 percent. Sexual harassment filings increased for the first time since 2000, numbering 12,510, up 4 percent. Additionally, a record 16 percent of sexual harassment charges were filed by men, up from 9 percent in the early 1990s.

Age Claims are the *Fastest* Growing

Age cases had the largest annual increase since 2002, up 15 percent. In general, age discrimination is the fastest growing class of cases in the

federal courts these days. Why? All of the baby boomers, of course. They're all over the age of forty and accustomed to asserting their rights.

Last but not least, the report indicated that religion was up to record high levels, doubled since 1992.

These statistics don't even reflect the number of private suits that have been filed but those numbers are also at historic highs. What's apparent from these statistics is that you have, unfortunately, a good chance of someone complaining about these matters. Being prepared for your first (or next) such complaint is key.

Tips for Preparing Your Company for Complaints

It helps to talk to all your employees about discrimination before they come to you with a complaint. At a minimum, review your company's policies about discrimination and ethics codes at least once a year. If you have an inside or outside training department, bring them in to do training reviews at least once every two years. If you do, you'll gradually reduce the amount of claims, as well as assuring your employees that you take these matters seriously.

Introducing Training

If you do bring someone in to do training, introduce the instructors yourself and say something like this: "As you know, these are important matters for our organization. We take complaints about discrimination, harassment, ethics or safety violations very seriously. I want you all to be aware of what acceptable behavior is in our workplace. Please know that I'm available to talk about any concerns you might have about these matters."

Encouraging Complaints

It might seem counter-intuitive for you to actually encourage people to come to you with complaints. You might even feel that you already have enough employee complaints! Yet believe me, complaints are the good news. If employees perceive problems in any of these areas, you want them to come to you first, not go over your head or to an outside agency. You don't want the first you learn about a legal problem to be the subpoena that lands on your desk!

If you have these kinds of sessions with your employees on a regular basis, they'll be more likely to trust you when they do have a complaint, to come to you first and to be more reasonable in working out the problem. Create an environment where you're safe to confront.

Invest in Training

The investment you make in training is small compared to a \$3 million judgment, not to mention the loss of your reputation and the internal time and energy it takes to respond to complaints.

Tips and Trends

Interestingly, the last three complaints I've investigated have been brought by men. Two were alleged discrimination complaints; one was other kinds of misconduct. I think this shows that it's not enough to assume that training on the traditional kinds of sexual harassment will serve you.