// Louisiana Employment Law Letter

H. Mark Adams, Editor; Sidney F. Lewis V and Jennifer L. Anderson, Associate Editors

January 2002 **Vol. 10, No. 10**

Highlights

- When it comes to retaliation, timing is everything
- Hair salon untangles messy personnel problem
- Employer's 'lie' isn't fatal to its defense
- Not all injuries are disabilities
- Documentation, documentation, documentation
- Refusing to work in 'unsafe' conditions
- Studies show employers may share rising costs with employees

DISCIPLINARY ACTIONS

When it comes to retaliation, timing is everything

Why do "perfect" employees suddenly go bad? Most of the time it's because they were never "perfect" in the first place. Their supervisors just give them inflated performance evaluations, ignore their deficiencies, and hope they'll go away. But when they don't go away, their supervisors eventually have to face the facts and counsel their less-than-perfect employees. And when a counseling session occurs shortly thereafter, the less-than-perfect employee lodges a discrimination complaint, and it's usually the supervisor's behavior that ends up being questioned. One employer recently learned that lesson the hard way in a decision by the U.S. Fifth Circuit Court of Appeals, which covers Louisiana.

11th-hour discipline

The employee worked as a lab technician for the Texas state health department. After more than 25 years without any documented problems, she filed an internal complaint against her program director, claiming he discriminated against her because of her ethnicity and gender. Specifically, she claimed that she was assigned secretarial duties that other male and non-Hispanic lab techs were not required to perform.

Seven months after the employee complained, the program director denied her a merit pay increase that her immediate supervisor had recommended she receive. After being denied the pay increase, the employee filed another internal complaint, alleging that the denial was in retaliation for her first complaint. She also filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging gender and national origin discrimination and retaliation.

While the employee's EEOC charge was still pending, she received two disciplinary "counseling sessions" regarding purported abuse of the employer's sick leave policy and inappropriate sexual

behavior in the workplace. The employee amended her EEOC charge to allege that the counseling sessions also were in retaliation for her earlier complaints.

The EEOC concluded that there was enough evidence to believe the employee had been retaliated against for her discrimination complaint, although she failed to offer sufficient evidence of actual discrimination. The employee then sued her employer in federal court in Texas, and the employer filed a request to have the case dismissed. The court granted the request, but the employee appealed the decision to the Fifth Circuit.

Suspicious timing is bad news for employer

First, the Fifth Circuit agreed with the employee's claim that the denial of a pay increase can support a retaliation claim. The court explained that because the denial can affect a "term, condition, or privilege of employment," an employee could prove that it constitutes an "adverse employment action."

Next, the court examined whether the employee could prove the denial of a pay increase and whether the disciplinary sessions were retaliatory. In deciding the employee had enough evidence on that issue to avoid dismissal of her lawsuit (and get her claims to a jury), the court focused on the following:

1. an alleged statement by the project director that he denied the recommended pay raise because of the employee's discrimination complaint; and
2.) the fact that the employee had no documented disciplinary problems until after she filed her EEOC charge.

Considering those facts, the court said a reasonable jury could find that the employer's actions were retaliatory. Therefore, the district court should not have dismissed the employee's case but should have let the jury decide. Fierros v. Texas Department of Health, 2001 U.S. App. LEXIS 24953 (5th Cir. Nov. 21, 2001).

Next time something like this happens to you . . .

Just remember to treat similarly situated employees similarly. And if you're going to document, be consistent. When an employee files a complaint, either internally under your grievance procedure or with a state or federal agency, continue to treat her the same as you did before and the same as you're treating other employees. The key is consistency.

If you are going to document problems or discipline an employee for poor performance, don't wait until she complains to the EEOC. If you've let stuff slide before, you may have to let it slide some more. Unfortunately, that's the price you may have to pay for your supervisors not doing their jobs.

On the other hand, if you've been documenting all along, you don't need to stop just because an employee makes a complaint. A court would be hard-pressed to find your timing "suspicious" if your supervisors have been doing what they're supposed to have been doing all along.

Copyright 2002 M. Lee Smith Publishers LLC

LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.