

What Can You Do After An Employee Engages in "Protected Activity?"

Your first question may be, "what is protected activity?" Protected activity can be any opposition done internally or externally to illegal discriminatory action or illegal activity of the employer. The opposition must be clear and specific. It is insufficient for the employee to complain verbally or in writing that he or she has been treated unfairly without identifying the unlawful basis for the unfair treatment. Similarly, it is insufficient for an employee to refuse to comply with the order of a supervisor without identifying the illegality of the action being the reason for the refusal. Protected activity can also be participation in the statutory complaint process. Participation includes filing a Nebraska Equal Opportunity Commission ("NEOC")/ Equal Employment Opportunity Commission ("EEOC") charge; taking part in an NEOC/EEOC investigation, or testifying at a NEOC/EEOC hearing or trial. If you employ more than 15 employees then Title VII, the Americans with Disability Act, and the Nebraska Fair Employment Act and their respective retaliation provisions apply to you.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination in employment based upon race, color, sex, religion, and national origin.
2. The Americans with Disability Act, ("ADA") 42 U.S.C. §§ 12101 to 12117, prohibits discrimination in employment based upon a person's disability.
3. The Nebraska Fair Employment Practices Act, ("NFEPA") Neb. Rev. Stat. §§ 48-1101 to 48-1125, prohibits discrimination in employment action of persons based upon race, sex, religion, national origin, disability, and employees who have opposed an employer's unlawful practice or refused to carry out an unlawful employment practice.
4. The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 to 633a., prohibits discrimination in employment action based upon a person's age by an employer with 20 employees. It protects employees who are 40 years or older. There is also the Nebraska Act Prohibiting Unjust Discrimination Because of Age, Neb. Rev. Stat. §§ 48-1001 to 48-1010, which protects persons between the ages of 40-70 by employers with 25 or more employees from discrimination based upon a person's age.

Regardless of how many employees you have the public policy exception to the employment-at-will doctrine applies to you. You may not fire an employee in contravention of the State's public policy. Public policy has been found to be established with sufficient clarity in the statute under the following circumstances.

1. Requiring an employee to take a polygraph test as a condition of employment or continued employment because it is specifically prohibited by Neb. Rev. Stat. § 81-1932;
2. The filing of a Worker's Compensation claim;
3. An employee reporting a suspected violation of the criminal code and an employee's refusal to violate the criminal code; or
4. An employee's report of patient neglect or abuse in compliance with the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387.

However, the fact a statute exists addressing a specific issue does not necessarily mean it has created a public policy which a State court will recognize. The Nebraska Supreme Court did not find that the Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 created public policy with sufficient clarity. To be on the safe side it is probably advisable to assume that if the employee has spoken out against a violation of statute or

exercised any statutory remedy, it would be recognized as a public policy exception to the employment-at-will doctrine.

The employee does not need to prove the underlying discrimination or illegal activity claim in order to prevail on a retaliation claim. The employee must only have a reasonable belief that discrimination or illegal activity by the employer has occurred. It is possible for an employee to lose on the underlying discrimination claim, or for the illegal activity not to be proven; yet he can still succeed on the retaliation claim. It is often times the employee's treatment by the employer after the employee has engaged in protected activity that the finder of fact, whether it be a hearing officer, judge, or jury, finds more egregious than the underlying discrimination claim.

Some of you may already have a written policy against retaliation when an employee complains internally about discrimination or harassment. A written policy prohibiting retaliation is helpful, especially when there is training to employees on the existence of the anti-retaliation policy and the policy is followed. It is not unexpected that hard feelings and tension will follow any accusation or charge of illegal discrimination or any complaint of illegal activity by the employer. If your employee has engaged in any protected activity, as discussed above, you may not retaliate against the employee by taking an adverse employment action.

What is an "adverse action?" In *Burlington Northern and Santa Fe Ry. Co. (now known as BNSF Railway Company) v. White*, (June 22, 2006), the U.S. Supreme set forth the standard for determining what constitutes adverse actions in Title VII retaliation cases. The Court determined that adverse actions are not limited to employment actions. The Court found it significant that while the Title VII anti-discrimination provision prohibits discrimination in employment actions, the anti-retaliation provision is not limited to employment actions. The Court also noted that the purpose of the anti-discrimination provision is to prevent injury to persons based on who they are, "i.e., their status" and the purpose of the anti-retaliation provisions is to prevent injury to persons for what they do, "i.e., their conduct." The Court found that retaliatory adverse action can include any action in which a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" White was employed as a track laborer by the BNSF Railway Company and assigned the duties of a fork lift operator. After White complained about sexual harassment she was reassigned to standard track laborer tasks which were more arduous and dirtier and less prestigious than being a fork lift operator, and was subsequently suspended without pay for insubordination. The suspension was later reversed through the grievance procedure and she was awarded back pay. Utilizing the reasonable person standard, the Court held that a reasonable person could have found that the transfer of duties and suspension without pay were adverse actions under Title VII and affirmed the verdict in favor of White.

Even though *White* ruled on Title VII retaliation, its holding arguably can be extended to apply to retaliation actions brought under the ADA and the ADEA. The language of the retaliation provisions of Title VII, the ADA, and the ADEA all make it unlawful for an employer to discriminate against any employee engaging in protected activity without limiting the discriminatory action to employment action.

The Nebraska Supreme Court may be persuaded to follow the *White* decision as well as in determining what constitutes an "adverse action" under the NFEPA. NFEPA's retaliation provision also makes it unlawful for an employer to discriminate against an employee who

engages in protected activity without limiting the discriminatory action to employment action. The Nebraska Supreme Court has previously followed Eighth Circuit case law for the definition of adverse employment action and has determined that an adverse employment action is a tangible change in working conditions that produces a material employment disadvantage.

There must be a causal connection between the protected activity and the adverse action. The closer in time the protected activity is to the adverse action, the easier it will be for the employee to prove a causal connection. The more time that has passed since the protected activity and the adverse action, the more difficult it will be for the employee to show a causal connection. The adverse action decisionmakers must also be aware of the protected activity for a causal connection to exist. Note that retaliation has been found without employer action when co-employees were allowed to harass an employee who had engaged in protected activity when the employer failed to take corrective action against such conduct.

The fact that an employee has engaged in a protected activity does not insulate the employee from adverse employment actions being taken. If there is a legitimate basis for the adverse action, the employer may take the adverse action. If you take an adverse action against an employee after the employee has engaged in protected activity, be prepared to defend the decision for the adverse employment action to the NEOC and/or the EEOC. Evidence that would support the legitimacy of the adverse employment action may include documentation of prior disciplinary problems, witnesses to an act of insubordination, or a record of poor performance evaluations which precedes the protected activity. Evidence that may suggest that the adverse employment action was taken for retaliatory reasons would include the employee's exemplary employment record prior to the protected activity, or if you have treated employees who are similarly situated differently for the same problem or offense when the only difference between the employees is that one has engaged in protected activity and one has not.

If you have any questions on what to do after an employee has complained about protected activity, please call our office and we would be glad to discuss it with you.

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