Labor Letter

October 2014

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

The Chicken Or The Egg?

By Tillman Coffey (Atlanta)

You finally decided to take the long overdue disciplinary action. Jack has got to be disciplined. But just before you do, Jack, possibly sensing what's about to happen, makes a complaint of harassment. This is the first you've heard of this problem. Is the complaint legitimate? What do you do? Continue with the planned disciplinary action? Put your decision on hold while you investigate? Will it look like retaliation if you proceed with the discipline?

On the one hand, employers have the right to take disciplinary action. On the other hand, employees have the right to make good-faith complaints about what they believe is unlawful conduct without fear of reprisal. In situations such as the one described above, the issue will be which came first – the decision to take disciplinary action or the complaint of harassment.

Payback Time

To further the purpose of protecting employees' rights, most labor and employment laws have "anti-retaliation" provisions that protect employees' rights to voice concerns or make good-faith complaints about conduct or actions they believe to be inconsistent with legal standards and requirements. For example, the anti-discrimination laws protect employees' rights to complain about harassment and discrimination, to participate in an investigation of a complaint, to oppose harassment and discrimination, and to file a charge or a lawsuit without fear of reprisal.

Likewise, OSHA and similar state safety laws protect employees' right to raise concerns about safety issues. Federal and state wage-and-hour laws protect employees' rights to raise certain concerns related to pay practices. Leave laws protect employees from retaliation for exercising their rights to request or take leave. Even the bankruptcy code includes an anti-retaliation provision that in some circumstances protects employees who file for bankruptcy protection.

Because these laws protect employees' rights to raise concerns and take other actions, an employee who raises a concern under one of these laws is deemed to have engaged in "protected activity." The employee in the hypothetical above engaged in protected activity when he complained about harassment. Retaliation occurs when an employer takes an adverse employment action against an employee *because* the employee engaged in protected activity. Thus, if the employee in the hypothetical above establishes that he was disciplined because he complained, his retaliation claim likely will succeed.

Adverse employment actions may take the form of discipline, discharge, denial of a promotion, transfer, raise, or other benefit, and pay cuts as well other employer actions that may have an adverse effect on the employee who engaged in protected activity.

In many cases, the timing of the adverse employment action is usually the employee's best evidence of retaliation. By way of example, Jill is a productive employee. She has an attendance problem but has never been formally disciplined. In July, Jill complained about sexual comments by her manager, and about her coworkers viewing porn at work (the complaint is protected activity).

In August, Jill is terminated for excessive absenteeism (an adverse employment action). Jill alleges that her termination was in retaliation for her July complaints, even though her poor attendance record is irrefutable. Her theory is that her attendance was not problem for the company *until* she made her complaint. She also may be able to bolster her claim with evidence that other employees with comparable attendance records who had not made a complaint were not terminated.

Retaliation claims are on the rise. In each of the last three years, there were more retaliation charges filed with the EEOC than any other type of charge. In most cases, the retaliation charge or lawsuit also includes a claim or claims of discrimination, harassment, or some other alleged unlawful actions by employer. The charge or complaint may allege that the retaliation occurred in response to the employee's complaint about the underlying conduct believed to be unlawful. Even if the employee does not prevail on the underlying claims of unlawful conduct, the employee may still prevail on her retaliation claim if she can show that her employer took the adverse action against her for engaging in protected activity.

Staying Out Of Trouble

To avoid these difficult and hard-to-defend cases, many employers consider employees who have engaged in protected activity to be somewhat "bulletproof" when it comes to taking disciplinary action against them. In these situations, even *before* taking a legitimate disciplinary action, prudent employers will carefully consider whether they can convince the EEOC, a jury, or an arbitrator that the disciplinary action had nothing to do with the employee's exercise of her protected rights.

Issues to consider are what actions have been taken in the past under circumstances such as these. Have all employees with the complaining employee's performance or conduct issues been treated the same way? Are there established policies and practices that have been violated? Is there documentation of disciplinary actions that occurred before the protected activity? Would the planned disciplinary action seem to an outsider to be the next logical step considering everything? If the answer is "yes" to all

Continued on page 3

When Employees Solve Problems With Their Fists

By Michael Elkon (Atlanta)

Generally speaking, human resources professionals and business executives have become quite adept at dealing with employee claims for illegal harassment. For example, just about any HR manager can provide a definition of a "hostile work environment." Likewise, HR managers are keenly aware of what to do when handling workplace romantic relationships or inappropriate conduct that have the potential to generate a lawsuit.

But can HR managers provide a legal definition for the term "assault?" This has become an important new concept for managers to learn in supervising employees and ensuring that the workplace is not a breeding ground for litigation. HR managers are accustomed to investigating employee complaints with an eye towards the common federal claims upon which they have been trained, but they are now going to have to pay attention to emerging state-law claims, as well.

How Assault And Battery Is Different

Civil claims for assault and battery have existed for decades, but in recent years, lawyers representing employees have started to make use of these claims with increasing frequency. Here's why:

Civil assault is typically defined as an instance when a person demonstrates the intent to hurt another and the victim believes that they will be hurt. There is no requirement of actual contact or physical injury, which is why the legal definition of assault is so different than the common English meaning. The legal standard is relatively low and contains a subjective element, i.e. that victims believe that they are in danger of immediate harm. Thus, an assault claim can be hard for an employer to disprove. Likewise, a battery is typically defined as a physical touching without consent. Again, the standard here is often fairly low.

Assault-and-battery claims regularly come down to contested factual questions, usually between the recollection of the victim and the alleged wrongdoer as to the nature and specifics of the incident in question. It can be hard to get summary judgment in these "he said, she said" situations.

In contrast, federal discrimination and harassment claims involve either adverse employment actions for which the employer is in possession of the relevant information regarding the rationale for the action or a hostile work environment, which is a high burden for an employee to meet.

Assault-and-battery claims are based on state law, which means that an employee can usually avoid having the case heard in federal court. This is significant because state judges are often less likely to grant summary judgment and are more prone to take a hands-off approach to discovery.

Most states do not have a broad body of reported case law regarding assault-and-battery claims, especially in the employment context. This stands in contrast to federal law on discrimination and harassment claims, which is extensive and generally useful for an employer seeking summary judgment on claims brought by a former employee.

In short, assault-and-battery claims are harder for an employer to litigate in a clean, quick fashion. They are more fact-intensive, there is less law upon which an employer can rely, and they are typically litigated in forums that are more favorable for employees. That means that the settlement value of an assault-and-battery claim is often higher than that of a discrimination or harassment claim based on the same facts.

So what should a prudent supervisor or human resources manager do to best protect a company against an assault-and-battery claim? Here are a few basic steps:

1. **Be aware that these claims are real**
   The first step in guarding against a threat is to know that it exists. It's important for managers to be aware of the applicable definition of assault and battery in their jurisdiction. Although the definitions are generally similar, there are important variations from state to state.

2. **Listen for the key terms**
   One of the basic skills for being a good HR manager is being an adept listener. Dealing with potential assault-and-battery claims is no different. With discrimination and harassment claims, the focus is on whether the employee is being treated differently on the basis of a protected characteristic, so the words to listen for all relate to fairness and equal treatment.

   But with assault, the focus is on whether the employee was in apprehension of an injury and with battery, the focus is on actual physical contact. The key words to listen for relate to fear and then to any sort of touching. The treatment of other employees is critical in a discrimination or harassment case, but not as much with assault and battery.

3. **Ask the right questions**
   In a harassment or discrimination claim, HR managers know to ask questions about how the supervisor or coworker treats other employees, and how that conduct affected the complaining employee's ability to do the job. Critical questions in the assault-and-battery context, include "did he actually make contact with you?" "do you have any injuries?" "do you need to speak with a physician or a mental health professional?" "did you feel like you were about to be physically harmed?" and "what made you feel like you were in danger of an injury?"

4. **Document the results of the investigation**
   This is good advice for any investigation, but it is especially important in the assault-and-battery context because employees rarely know that assault and battery can be civil claims against their employer. A prudent HR manager should try to avoid a situation in which an employee has a general sense of being disrespected and then over the course of an interview with a lawyer, is directed into describing the incident as one of assault and battery.

   Getting an employee to document a grievance in the immediate aftermath of an incident can be very useful in combating the coached descriptions that can come out once an employee has been prepared for a deposition in a civil suit.

5. **Emphasize the importance of avoiding fear and physical contact in the workplace**
   Again, this is good advice in general, but the specter of an assault-and-battery claim can be useful ammunition in dealing with employees (and especially managers) who come too close to the line for acceptable conduct.

   For instance, a supervisor who is sometimes loud and aggressive with subordinates might defend that style of managing as being necessary in the particular work environment. It's one thing to defend that manner of management as being a personal style; it's another thing to have to defend that style after being told that

Continued on page 3

When Employees Solve Problems With Their Fists

Continued from page 2

placing employees in a state of fear of injury can expose the company to the possibility of defending a messy lawsuit.

Asking that supervisor "do you really want to have to explain in a deposition that you did not intend to hurt that employee in a situation where the employee says that they were in fear of immediate injury?" can get the point across quite effectively.

6. **Use arbitration agreements**
Arbitration provisions are not perfect for every employer-employee relationship, but the assault-and-battery context is one in which they can be useful. Defending against assault claims can be challenging, as you need to convince the fact finder that the conduct of the accused might have been insensitive or even rude, but it did not meet the legal definition of assault.

That argument will be far more effective when the fact-finder has a legal background, as is the case in arbitration and is not the case in a jury trial. Arbitration provisions are not a panacea, but when weighing whether or not to use them, the prospect of an assault-and-battery claim is increasingly as one factor to consider.

For more information contact the author at MElkon@laborlawyers.com or 404.231.1400.

The Chicken Or The Egg?

Continued from page 1

these questions, the risk of a retaliation is lessened but not eliminated. In close calls, smart employers pull back and wait until next time.

So, what about Jack, who seemingly made a protected complaint in anticipation of disciplinary action? We can't know without more background facts. But one way to lessen the risk in situations such as this one is to document the decision as soon as it is finalized and *before* it's communicated. The employee's manager can send a simple email to Human Resources or vice versa informing the recipient of the planned disciplinary action and the timing of same before the manager meets with the employee. This simple step should resolve the eternal issue of which came first – at least in this case.

For more information contact the author at TCoffey@laborlawyers.com or 404.231.1400.

Unemployment Claims: Do You Really Want To Fight It? [1]

By Rich Meneghello (Portland, OR)

There are a lot of misconceptions regarding unemployment claims filed by recently-departed employees. This article will try to shed some light on them and help answer the common question: "Should we fight an unemployment claim?"

A recent state court decision from Oregon shows just how difficult it is for employers to prevail in such claims, and might lend you some guidance in answering this question for yourself. (The laws dealing with unemployment claims vary widely from state to state, but by and large all follow the same general patterns).

One Employee's Very Bad Day

Lisa Fox worked as a pharmacy technician for Kaiser Foundation Health for over 13 years until her termination in January 2013. On January 17, 2013, Lisa knew she was in for a bad day as she was perilously close to being late for work. Her company required her to clock in for her shift within four minutes of the start time of her shift, meaning she needed to clock in by 6:34 a.m. or face possible disciplinary action. She was already on notice of prior attendance violations, so she was frantic that morning and in a rush to get to work on time.

She drove her car into the parking lot, parked it in a loading zone near her building's entrance, and dashed into the workplace to try to beat the clock. She breathed a sigh of relief as she punched in at 6:33 a.m., then returned to the parking lot to move her car into a regular parking space. She arrived back at her work station at 6:36 a.m. to begin her work day. When her employer learned about this situation, it promptly terminated her employment for "time-card fraud," concluding that she inappropriately got paid for several minutes while not actually performing any work, and had effectively lied about her true start time.

Fox filed a claim for unemployment benefits, which was initially denied by the Employment Department. She then appealed to an administrative law judge, who reversed the decision and granted her benefits. Kaiser then appealed that decision to the Employment Appeals Board, which overruled the judge and denied benefits. Lisa then appealed to the Oregon Court of Appeals, which issued a ruling in March 2014 saying that Lisa should be given one more chance to try to prove her case. In order to understand this decision, it is important to take a step back and understand the rules at play.

A Close Case

The Oregon Employment Department, along with most employment departments around the country, allows individuals to receive partial compensation while in between jobs in order to help tide them over. But not everyone qualifies for these benefits. Employees who voluntarily quit aren't entitled to unemployment because they should have made plans for compensation before abandoning a paying gig. And employees who

Continued on page 4

Unemployment Claims: Do You Really Want To Fight It?

Continued from page 3

commit an act so reprehensible that anyone committing it would end up fired, also cannot enjoy the benefits because it's their own fault that they are without compensation.

If an employee punches someone, steals something, does drugs, or drinks alcohol at work, you can feel pretty comfortable that their benefits claim will be denied – but anything beyond that is tricky. The rules are fairly liberal in nature and allow employees to collect unemployment benefits even when they *deserve* to get fired, so long as their conduct wasn't "egregious" in nature. (again, different states use slightly different criteria, but you get the idea).

So an employee who screws up the job, continually shows up late, blows a critical presentation, loses a big account, consistently gets poor evaluations, forgets basic company rules, or just plain proves to be too unskilled for the position, will probably still get benefits. And if the employee commits an egregious action but claims that it was "an isolated instance of bad judgment," the state – at least some of them – may give the employee a one-time pass and allow them benefits anyway (so long as the conduct wasn't unlawful in nature). That's just what Lisa Fox argued: that her "time-card fraud" was actually just a one-time screw up that should be forgiven.

The Oregon court didn't go so far as to agree with her, but it did say that the lower agency didn't properly examine her mental state when

making its ruling. The appeals court said that whether a rule violation amounts to an isolated instance of bad judgment depends on not only the seriousness of the conduct but also the claimant's mental state when committing the act.

Here, Fox said that she made a "snap decision" while in a rush that morning, that she didn't realize what she was doing would be considered "fraud," and that she has time-management issues due to diagnosed attention-deficit disorder. All of these things, she said, should play into the decision in determining whether she should get benefits. The court agreed with that much, noting that the lower agency should take testimony and evidence about these issues before rendering a decision, sending the case back to them for further proceedings.

Drawing Conclusions About Drawing Unemployment

So what lessons can employers take from this decision? In other words, should employers fight unemployment claims?

First off, as described above, you should understand that there is a very high hurdle at play to get an employee disqualified. More importantly, understand that unemployment claims aren't referendums on whether the termination was justified or lawful. There might be a very good, non-discriminatory, well-documented, and supportable reason to terminate an employee, but that doesn't mean that an unemployment claim will be denied.

So don't feel the need to have to fight the claim in order to prove that you were in the right. But if you do decide to fight a claim, be sure that you take it seriously and not try to wing the hearing without preparation. Employers' statements during the claims process are made under oath, so even though the ultimate decision might not impact a later discrimination or wrongful-discharge claim filed by the worker, the statements made during the process are going to lock you into a story. Do your homework and prepare as if you were in court.

The answer to whether you should fight an unemployment claim is "it depends," but at least understand the risks and consequences should you decide to venture down that path.

For more information contact the author at RMeneghello@laborlawyers.com or 503.242.4262.

[1] This article was originally published in the Daily Journal of Commerce.

Office Locations

Atlanta
phone 404.231.1400

Baltimore
phone 410.857.1399

Boston
phone 617.722.0044

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Columbus
phone 614.221.1425

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Gulfport
phone 228.822.1440

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

Memphis
phone 901.526.0431

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Antonio
phone 210.227.5434

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

www.laborlawyers.com

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters