

DEEP DIVE

The risky intersection of employee discipline and protected activity

When timing alone can establish retaliation, what's an employer to do?

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It's illegal — and downright foolhardy — to retaliate against employees for engaging in protected activity. Most employers wouldn't dream of firing an employee because of a discrimination complaint, for example, or disciplining an employee for Family and Medical Leave Act (FMLA)-qualifying intermittent absences.

But what if you discover, after the discrimination complaint has been lodged, that the employee has been embezzling from you for years? What if the employee taking leave has had significant — and worsening — performance issues for the past few years, long before his or her illness?

Engaging in protected activity doesn't insulate an employee from legitimate discipline, or does it?

Employers face an uphill battle

"It's important to understand that the timing alone can establish a *prima facie* case of retaliation," according to Philip K. Miles III, a shareholder at McQuaide Blasko.

"In other words, the employer must come up with some evidence to show that there was a reason other than retaliation for its actions. This may seem backwards to employers, who are used to 'at will' employment where 'no reason' is a good enough reason. But, with suspicious timing, the employer must build its case," said Miles, speaking to HR Dive via email.

This means that when an employee has engaged in protected activity, it's especially important for the employer to have a clear

record of facts that justify any disciplinary action, according to attorney Daniel F. Pyne III, a shareholder at Hopkins & Carley. "Employers can find themselves in a weak, vulnerable position if they impose discipline on an employee who has engaged in protected activity and try to justify the discipline with nothing more than vague, subjective opinions about the quality of the employee's job performance," he told HR Dive via email.

Build your case and state your reasons

Preparedness, documentation and good communication are vital, according to Eric Meyer, partner at FisherBroyles, LLP.

"When you terminate someone who has just taken some sort of protected leave or complained about discrimination, or when the timing is otherwise unusually suggestive of retaliatory animus, it's important to communicate to the person the reason or reasons why you're terminating their employment."

A plaintiff's lawyer may walk away from a case if the fired employee is forced to admit, "They told me they were firing me for embezzlement," Meyer explained.

Additionally, in the case of performance problems, it's important to try to distinguish them from the protected activity or condition.

"In some cases, it's possible to separate a deficiency in performance from an employee's medical condition, but in other cases it is not," said Pyne. "An employee's poor attendance may be due to a medical problem, for example, but complaints from customers about rude treatment would be harder to link to a medical problem."

"It is very risky for an employer to take action against an employee for a performance or attendance problem that may be attributable to a known medical problem, particularly where the employee has notified the employer of the problem and requested some form of accommodation," he added.

Watch your timing

Should you ever discipline an employee *during* his or her leave?

Some experts, like Philip R. Maltin, a partner at Raines Feldman LLP, recommend that employers never discipline an employee on leave.

If you are about to discipline an employee who goes on leave before you are able to, "ensure you've dated the documents and disciplinary memorandum and have them ready to present to the employee when the leave ends," he advised via email. "Remember, the employee returns to the same situation he or she left. A leave of absence is not a reset."

Meyer, on the other hand, says "[y]ou can terminate their employment while they're on leave."

"There's nothing that says you have to talk to them," he said. "But, again, I think it's important to be transparent about why you're doing what you're doing so that [the employee] can at least second-guess their initial feeling that what [the employer] is doing is retaliatory."

Misconduct versus performance issues

Sometimes, however, employers discover misconduct shortly after an employee has engaged in a protected activity. It often happens with FMLA leave when a supervisor or co-worker takes over the individual's work and discovers wrongdoing. Courts have generally found that an employee out on FMLA leave isn't immune from discipline for misconduct discovered during leave.

"If an employer can demonstrate clearly that it learned during a leave of absence of misconduct that would clearly result in termination under any circumstances (theft, or some similarly serious offense), it would have a sound basis for terminating an employee on a protected leave," said Pyne.

"Misconduct is different than poor performance, however, and it's almost never a good idea for an employer to terminate an employee on leave due to poor performance," he continued. "If the employee was performing so poorly prior to a leave that he or she deserved to be terminated, management should have been more diligent and implemented the termination then. Doing so during a leave only raises questions about whether the poor performance is a pretext for some unlawful motive. In most situations, the employer would be wise to permit the employee to return to work, then impose discipline for poor performance that occurs after the employee's leave of absence."

"If the behavior is extreme, let them go," said Maltin. "If you need to investigate [and] need to hear the employee's side, wait for the

person to return. Do not disturb an employee on leave, unless it's an emergency."

Consider 'due process'

Employers also may want to consider something like "due process," noted Miles. "Unless they're dealing with public employees or employees with a contract or CBA, they are likely not entitled to actual constitutional notions of due process. But, employers should give the employee a chance to state their side of the story. It helps employers make sure they're really getting it right, and looks better if the case ends up in court."

After all, the timing alone is going to make any termination look suspicious, he continued. "As an employer, are you confident that you can convince a court (or, worst case scenario, a jury) to ignore the suspicious timing and accept your reason?" Miles asked.

And if you find yourself in this situation, don't try to go it alone, Pyne recommended: "Employers are always wise to confer with counsel before terminating an employee who has engaged in protected activity recently."