Retaliation Claims in the Age of COVID-19: Employers Beware

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Today, retaliation remains the most frequently alleged basis of discrimination in the workplace and far exceeds any other type of alleged discrimination, e.g., by age, sex, or race. Indeed, retaliation claims make up more than half of all claims filed with the Equal Employment Opportunity Commission.

Moreover, retaliation claims are often easier to prove because an employee typically does not have to establish the employer's "motivation."

Retaliation claims take many forms. Generally speaking, a claim arises when an employee engages in a "protected activity" under a federal, state, or local statute and, thereafter alleges they were subject to an "adverse employment action" because they engaged in a protected activity. If an employee is able to demonstrate the protected activity is causally related to the adverse employment action, an employer may be liable for retaliation, depending on the jurisdiction and applicable statute.

The emergence of COVID-19 has presented new avenues for such claims, including retaliation claims in connection with the Families First Coronavirus Response Act (FFCRA). These types of claims generally take two forms:

1. An employee contracts COVID-19, applies for leave under the FFCRA, and then alleges they were subject to an adverse employment action because they applied for leave.
2. An employee applies for leave under the FFCRA to care for school-aged children whose school or place of care shut down, and then alleges they were subject to an adverse employment action because they applied for leave. This is particularly notable because 55 of the country's 75 largest school districts are offering remote instruction and/or limited in-person instruction only, requiring many employees to seek leave.

As these claims make their way through the courts, employers should be guided accordingly. While retaliation claims may not always be avoidable, employers can and should take affirmative remedial steps to prevent against such claims in the future.

Two Cautionary Tales

Two recent cases underscore two common types of retaliation claims related to the FFCRA. The first case is *Gomes v. Steere H.*[1] There, Carol Gomes, a licensed practical nurse, contracted COVID-19 while on the job at Steere House, a nursing and rehabilitation center. Gomes alleged that shortly after requesting leave under the Family and Medical Leave Act (FMLA), as set forth in the FFCRA, Steere House terminated her employment because she requested leave.

Although Steere House disputed Gomes's allegations, its motion to dismiss was denied by the court. Notably, the court held Gomes's allegations were sufficient at the motion-to-dismiss stage, given:

1. Gomes was adversely affected by Steere House's decision to terminate her, and
2. There was a close temporal proximity between Gomes's request for leave and the termination of her employment, such that the allegations were sufficient to show a causal connection between Gomes's request to seek leave (the protected activity) and the termination of her employment (the adverse employment action).

The second case is *Kofler v. Sayde Steeves Cleaning Serv., Inc.*[2] There, Deborah Kofler began working for Sayde Steeves Cleaning Services in February 2020. In March 2020, Kofler's two minor children were forced to remain home because their schools were closed due to COVID-19. On or about April 1, 2020, Kofler advised Sayde her two minor children were at home due to COVID-19-related school closures and requested leave under the FFCRA. On or about April 8, 2020, Sayde terminated Kofler's employment, stating she would be eligible for rehire in 6 months.

Kofler brought suit against Sayde, alleging Sayde retaliated against her for pursuing her rights under the FFCRA. As in *Gomes,* Sayde disputed Kofler's allegations, and filed a motion to dismiss. As in *Gomes,*

the court denied Sayde's motion. Notably, the court held Kofler's allegations were sufficient to overcome Sayde's motion because:

1. Kofler plausibly alleged that she engaged in protected activity, and
2. There was a close temporal proximity between Kofler's request for leave and the termination of her employment by Sayde, such that Kofler plausibly alleged a causal connection between her request for leave (the protected activity) and the termination of her employment (the adverse employment action).

Steps Employers Can Take to Prevent Against Retaliation Claims

There are numerous steps employers can take to avoid situations like those alleged in *Gomes* and *Koffler*. The first step is to ensure it has strong antiretaliation policies in place. These policies may need to be updated given the emergence of COVID-19, but should already be firmly established. These policies should include a reporting procedure, which should be communicated to employees through training or otherwise, so employees know how and to whom such claims should be reported.

Employers should also have uniform procedures in place to conduct investigations of alleged retaliation claims. Employers should make it known to their employees that such complaints will be handled with the utmost care and will be addressed immediately. Employers must also be sure to document any investigation related to retaliation.

In addition, employers should be documenting employee performance, both positive and negative. Performance should be documented regardless of whether an employee requests leave, particularly if an employer intends to take an adverse action against a given employee. An employer who documents employee performance is much more likely to avoid a retaliation claim, because even if an employer's adverse action occurs in close temporal proximity to protected activity, an employer may be able to point to performance reviews as a basis for the adverse action, rather than being accused of taking such action because an employee engaged in protected activity.

Finally, we recommend that employers:

1. Wait at least 6 months before taking any adverse action against an employee who has requested or taken a COVID-19-related leave of absence.[3]
2. Strongly consider providing some severance pay or other valuable consideration in exchange for a release of all claims when terminating an employee who has taken such a leave.

In Sum

Employers should continue to allow eligible employees to seek leave under the FFCRA. At the same time, employers must be careful when making personnel decisions because the timing could result in an adverse claim. If employers take even basic steps to insulate themselves from potential retaliation claims, they will be less likely to face a retaliation claim. ■

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(1) CV 20-270-JJM-PAS, 2020 WL 6397930 (D.R.I. Nov. 2, 2020).

(2) 8:20-CV-1460-T-33AEP, 2020 WL 5016902 (M.D. Fla. Aug. 25, 2020).

(3) See, e.g., *Ward v. MBNA Am.*, 570 Fed. Appx. 143, 145 (3d Cir. 2014) (unpublished), holding six-month proximity between employee's protected activity and adverse action was insufficient to establish a prima facie case of retaliation.