



RETALIATORY HARASSMENT: PROMPT REMEDIAL ACTION RECOMMENDED

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Employees who file discrimination and/or sexual harassment charges against their co-workers are often subjected to various acts of retaliation. This retaliation often occurs when co-employees side with the accused instead of the accuser. In some instances, co-workers have physically harmed and/or threatened the accuser, destroyed the individual's personal property, and/or continued the originally complained of discrimination or harassment. More frequently, however, the accuser is socially ostracized, teased, ridiculed, and/or given the silent treatment by co-workers for reporting the inappropriate behavior of a fellow employee.

In the wake of the decision in *Jensen v. Potter*, 435 F3d 444 (CA 3 2006) which was Judge, now U.S. Supreme Court Justice, Samuel Alito's last written decision for the Circuit, employers should become more pro-active in preventing and promptly stopping retaliatory activities in the workplace before inappropriate behavior becomes actionable. *Jensen*, a female letter carrier, sued for sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964 after she became the target of retaliatory harassment by co-workers. She was subjected to her co-workers' wrath after filing a sexual harassment charge against a male supervisor, which resulted in his termination. Specifically, co-workers repeatedly insulted and berated her, clapped objects together behind her back to startle her, threatened her by driving motorized carts toward her at high speeds, and allegedly vandalized her car.

Although she complained to her supervisors for 19 months regarding the abusive behavior, the employer failed to intervene. Additionally, it refused to grant her request for a reassignment to a different work location. The court record indicated that mistreatment by her co-workers continued until a new supervisor stepped in, confronted her tormentors and stopped the harassment immediately thereafter. However, by that point, *Jensen* had suffered from panic attacks, utilized sick time for stress-related illnesses, and received emergency treatment for anxiety related asthma attacks. Based on these facts, she sued her employer, alleging that her co-employees' misconduct, in relevant part, created a retaliatory hostile work environment which was prohibited by Title VII.

Upon reviewing the retaliatory harassment claim, the 3rd Circuit held that a viable Title VII retaliation claim could be based on incidents of harassing behavior by co-workers that is allegedly in response to an employee's protected activity. In accepting *Jensen's* testimony that she believed her co-worker's harassment was severe and pervasive, the Court determined that the threatening behavior and vandalism of her car was sufficient to permit a jury to find she was subjected to a hostile work environment. Of greater concern, the Court determined that although the harassment was conducted by co-workers, the employer could be held liable for the creation of a hostile work environment based on a supervisory failure to take effective action for 19 months despite numerous complaints.

A public employer should promptly take remedial action to stop retaliatory activities by employees when it rises to a level of severe and pervasive harassment. Although it may not be known exactly when behavior has reached this level, it is fair to say that an expression of opinion and a silent treatment would not rise to the level of retaliatory harassment. However, where employees are engaging in more aggressive acts, municipal officials should intervene to prevent the work environment from being deemed hostile by a court. Among the actions an employer can take to diminish the likelihood a work environment will become hostile include:

- instructing supervisors to take all complaints of retaliatory harassment seriously and to report them;
- determining whether the victim of the harassment needs formal or informal assistance in dealing with his/her co-workers;
- investigating promptly any alleged acts of retaliatory harassment;
- meeting with the employees who are engaging in the inappropriate activities to advise them that their behavior is unacceptable and may result in them being disciplined, up to and including termination; and
- reissuing anti-retaliation policies after a discrimination or harassment charge is filed as a reminder to employees of the employer's position on retaliation and the consequences of engaging in same.

In addition to these remedial steps, public employers also can take pro-active measures to reduce the likelihood that employees will engage in retaliatory conduct. For instance, employers should annually review their policies, procedures, and handbooks to ensure they clearly state that retaliatory harassment will not be tolerated and may lead to disciplinary action up to and including termination. Further, they should ensure they have a confidential procedure for receiving complaints of retaliation so that inappropriate acts don't go unreported. Finally, employers should make certain that all of its supervisors and employees are trained on how to spot, report and stop retaliatory harassing behavior. This can be accomplished by incorporating this subject into annual employee anti-discrimination/harassment training.

Although an employer cannot require that employees be friendly and socialize, attempt to disarm retaliatory situations through education, communication, and prompt remedial action. Where an employer is unsure of how to proceed when employees are potentially engaging in retaliatory harassment, contact counsel for guidance. Editor's note; modify your harassment policy to prohibit retaliation of the type described above. An alleged illegal employer retaliation against a complainant was recently argued before the U.S. Supreme Court. Stay tuned.

PERB DECISIONS

These decisions which have been issued by either the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision by an ALJ should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal occurred. Email your editor, John Galligan, at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site, www.perb.state.ny.us where summaries of decisions issued since 1986 can be obtained and the agency's forms can be downloaded.

- the authorization for deputy sheriffs to pursue compulsory arbitration to resolve an impasse in negotiations is not without limitation. Civil Service Law, §209(4)(g) permits only those demands which are directly related to compensation to be pursued before an

arbitration panel. A prior Board decision to treat a nonmandatory subject in a bargaining agreement as a mandatory subject of negotiation if a party to the agreement were to seek to negotiate over the nonmandatory issue has no bearing on the scope of issues which may be pursued before a compulsory arbitration panel by a union representing deputies. That a bargaining demand is a mandatory subject of negotiation has no bearing on what issues a union representing deputies may pursue before they compulsory arbitration panel. December 19 Board decision in Putnam County;

- relying totally upon *State Police Investigators*, 30 PERB ¶3013 (1997), interpreting language that was virtually identical to that contained in Civil Service Law, §209(4)(g) which allows a union representing deputy sheriffs to pursue before a compulsory arbitration panel only those demands which are directly related to compensation, the Board has held that demands relating to recognition and union rights; personal leave; hours of work, overtime, and recall; vacations; grievances; sick leave and sick leave accumulation; discipline; maintenance of operations; separability of contractual provisions; a contractual zipper clauses; and the duration of the agreement could not be submitted to a compulsory arbitration panel. The Board held that the same result applied to a union representing deputies that sought to pursue such demands before a compulsory arbitration panel. On the other hand, demands addressing the retroactivity of wages and other economic benefits and health insurance benefits for current employees upon retirement may be submitted to a compulsory arbitration panel. December 19 Board decision in Putnam County;
- historically, the Board has refused to fragment an existing bargaining unit absent compelling evidence of a need to do so, such as proving the existence of a conflict of interest among groups of employees in the unit or demonstrating a history of inadequate representation of a group within the existing unit, rising to a level of systemic and intentional disregard of the interests of the group seeking fragmentation or a neglect or indifference to their interests. September 27 ALJ decision in Gananda CSD;
- an employer has a unilateral right to revert to and rely on explicit contractual language, even though it may have long had a non conforming past practice. September 30 ALJ decision in Colombia County;
- in order to establish a unilateral change in a past practice, the union must demonstrate that the alleged past practice affected a mandatory subject of negotiation and that the practice was unequivocal and existed for a significant period of time such that employees in the bargaining unit could reasonably expect the practice to continue. August 8 Board decision in NYS Department of Correctional Services;
- under Civil Service Law, §209-a (4) (b), the Board must petition a court for injunctive relief upon receipt of an application for such if, in conjunction with the alleged commission of an improper practice, the Board determines that the charging party has made a sufficient showing that there is both reasonable cause to believe that an improper practice has occurred and that immediate and irreparable harm will result without attempting to secure an injunction. By delegation, the Counsel to the Board reviews the application and files a written determination. Since the standard of proof for a charging party is a conjunctive one and since the harm factor is more readily determinable, evidence in support of that standard is reviewed at the outset. Should the showing of such harm be insufficient, the application will be denied. August 25 decision of Counsel in Buffalo Board of Education;
- except in an emergency situation, employer notice to unionized employees of decisions affecting terms and conditions of employment is a mandatory subject of negotiation. One of these would be advance notification of the anticipated length of an unplanned assignment. October 3 ALJ decision in NYS Division of State Police;
- an improper practice charge alleging a failure to negotiate over a unilateral increase in the amount of work to be performed will not be sustained. What would be improper would be

a significant increase in the amount of work to be performed in the same amount of work time. September 30 ALJ decision in Colombia County;

- a financial advantage to be gained by a unilateral change in a term and condition of employment is not a defense to a failure to bargain in charge. October 3 ALJ decision in NYS Division of State Police;

MANAGER OF WORKERS' COMPENSATION AND HR LEAVE PROGRAMS SOUGHT

The Roswell Park Cancer Institute (RPCI) is seeking applicants for a manager of workers' comp and HR leave programs in its human resources management department. This individual will serve as a team member responsible for the delivery of human resources programs, policies and procedures and services to RPCI. Primary accountabilities include the strategic and tactical management of workers' comp, FMLA, disability and sick leave programs. This individual will analyze current programs and develop reporting measures to ensure all benefits meet organization philosophies and cost parameters and represent RPCI at comp hearings. Candidates must possess a Bachelor's degree in an appropriate HR or financial field and a minimum of five years of progressively responsible experience in the design, administration and financial analysis of workers' comp and other mandated leave programs. Experience in both public and private sector settings preferred. Experience in a union setting and familiarity with Lawson HR software also preferred. Excellent verbal and written communication skills and advanced technology skills including proficiency in Microsoft Office Suite software required. Interested applicants should forward a resume and salary requirements to Employment Services Office, Roswell Park Cancer Institute, Elm and Carlton Streets, Buffalo, NY 14263.

MEMBER LIST INCLUDED

An updated member list is included with this month's Newsletter. Please email changes to your editor at galli14@earthlink.net should a correction be in order.

In addition, the postal service will not deliver mail to an address that lacks a street name and number. Forget about any common name for your work location. Should your mail label or listing be one of those few, please email the correction.

IRS CITE FOR CHANGE ON §207-a/§207-c FICA TAX DEDUCTION

Last month, a summary of a rule change by the Internal Revenue Service regarding the taxation of payments made under §207-a and §207-c of the General Municipal Law was noted. A cite for the new rule was omitted. On a search engine, track "irs" and on that page, search for "internal revenue bulletins". On that page, click on "Bulletin 2006-3" and then on "TD 9233" in the index that is displayed.