

into a lawsuit with an additional claim—retaliation.

The life cycle of the “twofer”

IN THIS CORNER | By Alan L. Rupe

EVERYONE WHO HAS EVER SAT IN A middle-school science class knows the experiment. A drop of clear pond water is placed onto a slide and the kids eagerly line up to put eyes to the microscope. Instantly, what at first appeared to be a translucent, placid liquid transforms into a bubbling, bacteria-infested cauldron. The seventh-grade mind boggles at the activities in that suddenly enlarged microcosm. The pretty becomes ugly.

What happens on a laboratory slide in science class also happens in the workplace. Any object, put under the management microscope and analyzed, always takes on infectious cauldron characteristics. In the workplace, that management microscope usually spells “liability” to employees’ lawyers.

Here is how it works: an employee makes a complaint to a supervisor about some violation of law or company policy. It may be an allegation of sexual harassment; OSHA safety violations; wage-and-hour concerns or any other law or corporate policy governing the workplace. Everybody rushes in to investigate: human resources managers, lawyers, supervisors, executive management team members and the union all get involved. Excitement is in the air. Co-workers are interviewed. Personnel files are examined. E-mail stored on the company computers is accessed. The complainer quickly becomes the center of attention and of the investigation. Inevitably, the person complaining is closely examined, viewed under a microscope. And things just don’t look as normal as before. The complainer’s smallest flaws enlarge in living color for every eye to see.

The temptation for the employer is

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GETTING UGLY ▲ An investigation has the potential to spawn a retaliation claim.

to correct these flaws and discipline the complainer. Plaintiffs’ attorneys call these situations “twofers,” a two-for-one. A lawsuit with one claim of discrimination suddenly turns into a lawsuit with an additional claim, retaliation, a claim often much easier to prove in court and with much larger damages available.

Some years ago, I was involved in a lawsuit that started when a receptionist complained she was sexually harassed. The company jumped in and investigated her complaints. Here’s what the HR investigator found: while the receptionist’s complaints of harassment and violation of company policy were true, many co-workers took the opportunity of the investigation to point out flaws in that receptionist’s work habits. She was the only smoker in the office and took extended smoke breaks while the others stayed at their desks. Away from her desk on the breaks, she missed handling several important phone calls.

Orders were not filled. Customers were forever lost. Her e-mails were also a problem. She sent hundreds of them to her friends across the city and country providing unflattering descriptions of the boss, the human resources manager and the boss’s wife. Under management’s microscope, it was clear that the receptionist was simply not fulfilling her job responsibilities and was a liability to the company. She was fired less than six weeks after she made her first complaint. And to no one’s surprise, she filed a lawsuit claiming retaliatory discharge.

Employers can go a long way towards inoculating the workplace against retaliation lawsuits by following a few simple rules.

Be prepared. Employers should have a procedure for dealing with employee complaints. The company’s employee handbook, disseminated to and acknowledged by all employees, is the most logical location for the procedure. Educating employees on the policy allows the employer to receive complaints through an organized procedure.

Breath deep, don’t react. Supervisors, human resources managers and the executive team must all be trained on how not to react when a complaint is made. Complaints are an early opportunity for management to correct mistakes and avoid liability. The rule for employers should be, “get over it and resolve it.”

Return to your corners. As my mother used to say to my sister and me during a squabble, “I’m going to separate you two.” Keep the complainant and the person complained about separate, but be evenhanded in how that separation occurs. If the two employees involved in the matter work together,

the person complained about may have to spend time on paid leave or work from another area until the investigation concludes. Make sure the person complained about and the management team understand the company's policy prohibiting retaliatory conduct.


Avoid the microscope effect. If the complaint is one of sexual harassment, don't get diverted. Keep the investigation centered on the allegations and the unfolding facts. A detour into the complainer's performance will quickly become problematic. Hit the "pause" button on the complainer's performance issues, then revisit for coaching, counseling and possible discipline long after the completion of the investigation and resolution of the original complaint. A supervisor who investigates a subordinate's complaints may have a lot to lose in terms of her own performance and her failure to properly manage employees. An objective person trained in investigations should do the exploration.

Don't create a twofer. Like complaints of discrimination, retaliation complaints involve "disparate treatment." A twofer complainer will allege in a lawsuit that because she made a legitimate complaint, she was treated differently (disparately) than other employees. Before taking any adverse job action against a

complainer, make sure that other employees have been disciplined for similar violations. If, for example, an investigation reveals that other employees have been disciplined for taking extended smoke breaks, it will be hard for the complainer to claim he was treated unfairly because he was similarly disciplined.

Don't spread it around. An investigation necessarily involves more than one person. But to the extent possible, investigations must be kept low-key and confidential. Keep those juicy bits of gossip quiet and don't pass on the jokes learned from employee e-mail files.

Don't be a jerk. This is one of my constant themes to employers. Juries don't like jerks. The investigation, the resolution and future workplace behavior must be civil and professional. This is not the time to use storm trooper tactics or call in the SWAT team. An aggressive reaction by management will be a problem to a jury in the courtroom.

Handling employee complaints and avoiding liability is not rocket science. But employers can learn something from middle-school science class: Be careful of microscopes and twofers. 

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