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EMPLOYMENT PRACTICES HOTLINE

## Retaliation Claims Haunt Risk Managers

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How can risk managers avoid claims of retaliation by employees making workplace complaints and grievances?

A software development company in Florida—XYZ Inc.—has had recurring problems with an employee who assumes the role of “jailhouse lawyer” on behalf of herself and colleagues who have expressed grievances about general workplace policies and personnel decisions.

The employee, Ms. Jones, is viewed by her supervisors as a marginal worker, in that she has been counseled from time to time on her performance deficiencies. After each of the sessions, the performance of Ms. Jones generally improves, but then deteriorates after a month or so, and there is no sustained improvement over time.

XYZ Inc. has experienced rapid growth over the past few years. However, its employee handbook has not been updated since the company’s founding, and management has had to tolerate less than optimal performance from marginal employees due to the company’s challenge to augment its infrastructure and employee population to keep up with an increase in sales.

Ms. Jones has voiced complaints about her own pay (that it is too low), her performance appraisals (claiming her supervisors are allegedly unfair in grading her performance), and about personnel policies and decisions at the company (that the insurance program is not “family friendly” enough, and management holds employees to a different standard of behavior than line supervisors).

When the time for pay increases recently arrived, management informed employees that due to the downturn in

the company’s business after Sept. 11, employees would receive a 3 percent cost-of-living adjustment, and that no pay raises would be accorded employees other than select individuals who demonstrated outstanding performance over the past 12 months.

Ms. Jones immediately sent a memorandum to management protesting this decision, and indicated that she and other female employees were being treated unfairly. She copied all female employees on the memo by e-mail.

The resulting impact of Ms. Jones’ memo was a dislocation in business operations, as employees did not focus on their work, but instead circulated e-mails back and forth to one another for the better part of the day complaining about the company’s payroll practices.

When management discovered some of this e-mail traffic, it determined that it wanted to fire Ms. Jones for insubordination, as well as her unwillingness to focus her efforts on performing her job, rather than constantly airing a laundry list of complaints about the company.

The employer called the “EPL Hotline” seeking counseling as to what to do next. The company’s goal was to terminate Ms. Jones as soon as possible. She is an “at will” employee, and XYZ Inc. has no union.

**Hotline Counseling:** The company finds itself in a predicament. Ms. Jones spends company time complaining about XYZ Inc., its management and its personnel decisions, and fails to give the company eight hours worth of work for eight hours worth of pay.

Her latest actions have “stoked the fires” with her co-workers, and has cost the company productivity in terms of the time lost attributable to the airing of gripes about the pay raise decision.

Nevertheless, an immediate termination would be risky. Ms. Jones is protected by federal and state employment laws in a variety of ways.

First, she made a complaint about alleged gender discrimination (allegedly unequal pay practices adversely impacting herself and her female co-workers). Such an allegation is protected by Title VII of the Civil Rights Act of 1964, and the Florida Civil Rights Act of 1992. Taking adverse action against Ms. Jones for asserting such a complaint would be an act of retaliation in violation of Title VII and the FCRA.

**S e c o n d**, Ms. Jones is also protected by the National Labor Relations Act, even though XYZ Inc. is a non-unionized workplace. By engaging in “collective activity” in asserting pay complaints on behalf of two or more employees (herself, and other female employees), Ms. Jones is arguably engaging in protected activity under the NLRA. Since communication among employees about their wages by definition generally involves two or more employees, the NLRA covers such conduct and protects Ms. Jones in the pursuit of her grievance.



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## EMPLOYMENT PRACTICES HOTLINE

Illegal retaliation can occur when any personnel decision impacts an employee in an adverse way. It can include a demotion, a failure to grant a pay raise, or an outright termination.

Federal, state and even local employment discrimination laws prohibit employers and supervisors from taking any retaliatory action against an employee for what are generally known as "protected activities." Under the law, "protected activity" certainly includes the types of allegations and the form of opposition which Ms. Jones has undertaken with respect to XYZ Inc.

Employees have an absolute right to oppose any employment practice if they believe in good faith that they are a victim of alleged discrimination. Every employee has the right under the law to make a complaint so long as they believe in good faith in their complaint.

In this instance, the company would be on thin ice if it would terminate Ms. Jones immediately for her activities.

In the past, Ms. Jones' performance problems have not been sufficiently severe to prompt the company to ever place her on probation or warn her of the consequences of continued poor performance. In essence, there is a track record of Ms. Jones completing her job requirements, and the company has never told her before that her job was in jeopardy on account of any performance deficiencies.

Terminating her now on the grounds of poor performance easily could be viewed as an act of retaliation.

While Ms. Jones is certainly not "termination proof," and all employees are expected to perform their job in an appropriate fashion and to follow all applicable personnel policies, Ms. Jones has not violated any workplace rule or failed to perform her job in a consistent manner such as to give XYZ Inc. the right to terminate her employment on the spot.

To avoid a potential lawsuit, management should "manage" Ms. Jones in the same manner as if she never brought any complaints to the attention of the company. In other words, the issue of the complaints should be absolutely irrelevant, and something that the company should never take into consideration when making a personnel decision about Ms. Jones.

The appropriate response to her complaint is to indicate that all workers have the right and privilege by law to make a complaint regarding personnel policies or wages, but that the company has the right to assert a vigorous defense to any such charge. In essence, the company should advise Ms. Jones that it disagrees with her complaint, and that she should get back to work and focus her energies on performing her job.

The company also should consider revising its employee handbook and

adopting personnel policies that would give it more management discretion in similar situations in the future.

Among other things, the company should adopt a policy on the use of its electronic systems, which includes a prohibition against airing personnel complaints in a public fashion, and requiring employees to direct any grievances to designated company representatives (for example, the human resources director). This would enable the company to attempt to prevent the broad dissemination of grievances that Ms. Jones accomplished by circulating her complaint about pay policies to the entire female staff of XYZ Inc.

In addition, the company could consider the institution of various complaint mechanisms, including an open-door/grievance resolution procedure, a complaint process for alleged instances of discrimination, or an alternative dispute resolution procedure. This would enable the company to identify any potential grievances, consider them, and resolve them before the complaints mushroom into the types of problems at issue in this situation.

Finally, the company should consider tightening up its performance appraisal systems so that marginal employees are put on action plans and probationary status, and advised that unless their performance improves over time, they are subject to termination. This would enable the company to deal more effectively with performance problems by marginal employees. **N**

**Complaining employees should be managed as if they never brought any complaints**