

Employment Law Newsletter

edited by K. Preston Oade

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RETALIATION AMONG THE MOST FILED CHARGE IN 2007, SAYS THE EEOC

by Maricela Barbosa

We'll tell you why the number of retaliation charges is so high and how to avoid them.

In 2007, charges alleging retaliation were among the most frequently filed charges, according to the Equal Employment Opportunity Commission. Last year, there were 82,792 claims filed nationally, up from 75,768 in 2006 — the largest annual increase (9%) since the early 1990s. Although race claims remained the largest category of claims, retaliation charges increased at a higher rate and were the second highest category, totaling 26,663.

Why Retaliation Charges are Increasing

First, the economic incentives to litigate are increasing because even meritless claims are worth nuisance value to settle, which most employers are willing to do. It comes down to basic economics: the more money employers pay to settle claims, the more likely claims will be filed.

Second, because juries tend to severely punish employers for retaliation, these cases tend to have higher settlement value. According to national and Colorado jury verdict reports, the biggest jury verdicts are awarded in retaliation cases. Because there is a lot of money on the line in retaliation cases, contingency plaintiffs' lawyers have learned how to create retaliation claims. Unwary employers, lacking preventive strategies and awareness, often fall into the trap.

How Plaintiffs' Lawyers Set Up Employers

As a typical example, consider employee Joe who calls a plaintiff's lawyer because Joe is worried about losing his job. He's been late for work too many times because of drug abuse. The lawyer tells Joe that his employer has the right to discipline him for this, but redirects his focus by asking if his employer "has done anything questionable – anything at all?" The only thing Joe can think of is a recent change to the pension plan that seems unfavorable to older employees.

"Great," says Joe's lawyer, who immediately writes a letter to the CEO on Joe's behalf. The lawyer demands that the pension plan changes be rescinded and informs the company that if they don't, Joe will file a charge of age discrimination with the EEOC. The letter also says that Joe's boss is unfairly singling him out for harsher discipline because of his age and demands an immediate investigation. The CEO refers the letter to Human Resources, who contacts Joe's boss to tell him that Joe is accusing him of age discrimination.

Two weeks later, Joe is late for work again and is fired for excessive absenteeism. He files a charge with the EEOC claiming he was fired in retaliation for complaining about age discrimination which, if true, violates federal law. Joe's charge points out that he had been late for work many times before but was only fired shortly after complaining about discrimination. In forwarding the charge for the employer's response, the EEOC wants to know who within the company knew about Joe's complaint. Since Joe's boss knew about his complaint, Joe has a viable retaliation claim.

The problem here is a common one. Employers unknowingly contribute to retaliation claims because front-line supervisors are often informed when employees file discrimination charges or

Correction: An error appeared in our January/February *Employment Law Newsletter* in the article entitled, "Department of Labor Proposes New FMLA Regulations." The article should have read: "Eligibility requirements have also been controversial and applied inconsistently. For instance, companies must have at least 50 employees before the FMLA even applies to them. Second, an employee has to have been an employee for at least 12 months before the employee is eligible for family medical leave. These requirements might change."

We apologize for any inconvenience or confusion this error may have caused.

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complaints. Informed? Isn't that what employers are supposed to be? No! Not when it comes to retaliation claims. When employers first learn that an employee has complained about discrimination or engaged in other federally "protected activity," the first instinct is to spread the word to find out how to respond. But, when front-line supervisors are told about federally protected complaints, any subsequent discipline by that supervisor is tainted by that knowledge, and the employer is vulnerable to a retaliation charge.

Joe's lawyer knows this, which is why he wrote the letter to the CEO – to set up a retaliation claim and to attack the discharge which Joe suspected was about to happen. These tactics work because many employers lack effective strategies to prevent retaliation claims. This is how employers' pockets can get picked by savvy contingency fee plaintiffs' lawyers.

Have a Preventive Strategy

Employers need to know the fundamentals of retaliation. To prove retaliation, the employee needs to prove that the same supervisor who made the discipline or discharge decision also knew about the discrimination complaint or other federally-protected complaint.

How do you avoid retaliation charges? Treat employee discrimination and similar complaints on a *need-to-know* basis. In other words, isolate and restrict knowledge about employees' protected activities. When an employee files a complaint with the EEOC or blows the whistle on company practices, keep that employee's supervisor in the dark whenever possible. If an investigation is appropriate or required by company policy, use finesse to find out what happened without telling the supervisor about the employee's complaint. And, document the fact that this was done without the supervisor being told about the employee's federally-protected complaint. This way, if the supervisor needs to fire an employee for a legitimate reason, the employee can't claim that the supervisor did so in retaliation against the employee, because the supervisor would have no knowledge of the federally-protected complaint.

This approach may not end all retaliation charges, but it is a step in the right direction.

BIG CHANGES TO FMLA GIVE MILITARY FAMILIES 26 WEEKS OF LEAVE

by Sven C. Collins

President Bush recently signed into law the National Defense Authorization Act for 2008, which changes the Family and Medical Leave Act (FMLA) to provide two brand new types of leave for families of service members. The first is "Servicemember Family Leave" that provides up to 26 weeks per year of protected unpaid leave in a 12-month period to employees to care for a family member (*i.e.*, spouse, child, parent, or next-of-kin) in the military who has been injured during active duty. This change went into effect on January 28, 2008, and is significant because it gives more than twice the usual 12 weeks that employees have for ordinary FMLA leave.

The second new type of leave allows otherwise eligible employees to take up to 12 weeks of leave due to any "qualifying exigency," because the employee's spouse, son, daughter or parent is on, or about to be called to, active duty in support of a "contingency operation." This change is not effective until the Department of Labor (DOL) writes regulations defining what is a "qualifying exigency" and a "contingency operation."

These new amendments do not change existing FMLA eligibility requirements. Also, the usual rules for substitution of paid leave, intermittent leave, and reduced schedule leave apply to the new types of military-related FMLA leave.

These changes require some immediate action, including posting a notice to employees of the Servicemember Family Leave entitlements and amending FMLA policies and leave request forms.

DOL PROPOSES MORE CHANGES TO FMLA REGULATIONS

The Department of Labor (DOL) has published proposed regulations changing existing FMLA regulations. (Copy available at <http://www.dol.gov/ESA/WHD/fmla/FedRegNPRM.pdf>.) The DOL proposes changes to the rules on the following issues: notification to employees when leave is deemed FMLA leave; the definition of a "serious health condition"; unscheduled intermittent leave; the medical certification and verification process; and clarifying that employees can waive FMLA rights in a settlement or separation agreement without court or DOL approval.

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ERISA CORNER *by Irene F. Gallagher*

Supreme Court Expands Liability Exposure of Fiduciaries of Individual Account Plans

The U.S. Supreme Court, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, has given an employee the right to sue his employer for not properly administering his 401(k) account. The Court's unanimous ruling seems to broaden the reach of the Employee Retirement Income Security Act ("ERISA") and the liability of defined contribution plans' fiduciaries, when in actuality, the ruling interprets an already existing right. ERISA already provides that participants may sue fiduciaries who breach their ERISA duties, with the remedy being the restoration of the plan all losses resulting from the breach by "the plan as an entity." *LaRue* makes clear that this protection now extends to any individual account in a plan, even if it represents only a small percentage of the plan's assets. Specifically, the Court permitted "recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

In this case, James LaRue had sued his former employer, management consultancy DeWolff, Boberg & Associates, after he lost \$150,000 in his 401(k) plan. He claimed that DeWolff failed to respond to his two requests to make investment changes in his account. As a result, his interest in the plan "depleted" by thousands of dollars. He subsequently accused the firm of breaching its fiduciary duty, but his case was denied by two lower courts.

The *LaRue* decision narrowly focuses on one theory of recovery under ERISA that permits a participant to sidestep a plan's claims and appeals procedures altogether and go directly to federal court. In essence, the decision permits participants a work-around the traditional judicial policy that promotes the resolution of disputes through a plan's required claims and appeals procedures, rather than immediate litigation, to encourage employers to sponsor plans. Thus, an employer in a *LaRue*-type claim will not have the advantage of protection by a fully-developed administrative record and limited review of its attempt at resolution to determine whether it was arbitrary or capricious. Rather, a participant can sue for a court's independent de novo review of the employer's alleged failure to fulfill ERISA responsibilities.

After *LaRue*, participants will also find it easier to provide evidence of losses resulting from a fiduciary breach. The decision removes the limitation for relief to situations where plan-wide losses (or subsequent lost profits) resulted from an alleged breach of fiduciary duty. To have a successful claim, a participant may merely produce evidence of losses (or lost profits) limited to his own account. The initial hurdle, however, remains unchanged by *LaRue*: that is, the suing participant must be able to prove a breach of fiduciary duty. As a result, this decision in itself is not likely to increase the number of ERISA lawsuits, but it may change the nature of cases we see in the future.

The *LaRue* decision should prompt plan sponsors and other fiduciaries of participant-directed individual account plans (including Section 401(k) and 403(b) plans) that are subject to ERISA to take steps to minimize exposure to participant lawsuits and potential liability.



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ELIZABETH H. MURPHY JOINS HRO

LOS ANGELES, CA — Welcome to Elizabeth H. Murphy, who has joined HRO as a partner in our Los Angeles office. She will focus on labor and employment.

Ms. Murphy represents California and nationwide employers in the mortgage lending, retail, manufacturing, hospitality, and entertainment industries in all aspects of employee relations, including: preparing employment policies and handbooks, negotiating and preparing employment and severance agreements, training managers and supervisors in discrimination and harassment issues, and defending employers in discrimination, wrongful termination, sexual harassment, wage and hour, unfair competition and misappropriation of trade secrets matters. She also provides advice and counsel on day-to-day personnel issues.

Ms. Murphy received her J.D. from USC Law School and her B.A. from UC Santa Barbara.

California Corner *by Don Samuels*

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2008

Other than San Francisco's universal healthcare law, which was discussed in great detail in the January/ February newsletter, there are no groundbreaking laws which took effect January 1, 2008, affecting California employers. However, employers should be aware of the following new laws:

Limitations on Social Security Number Displays

Employers may now include no more than the last four digits of an employee's Social Security number or an employee identification number on the itemized wage statement required by Cal. Lab. Code § 226.

Cell Phone Restrictions

Subject to certain narrow exceptions, drivers cannot use cell phones while driving unless the phone is equipped with, and the driver is actually using, a hands-free device.

Minimum Wage Increase

Effective January 1, 2008, California's minimum wage increased to \$8.00 per hour. This change not only impacts hourly employees, it also affects exempt employees who, under California law, must receive a monthly salary equal to twice the minimum wage for full-time employment. This equates to \$2,773.33 per month and \$33,280 per year.

Deduction and Hourly Rates for Computer Professionals

Computer professionals who meet certain conditions related to their job duties, and who earn a set hourly rate, are considered to be "exempt" from overtime payments. As of January 1, 2008, the hourly rate was reduced from \$41.00 per hour to \$36.00 per hour.

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