ORCA TALES

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Retaliation Becomes Most Common Charge

Retaliation charges become the most common charge filed with the U.S. Equal Opportunity Commission in fiscal 2010, surpassing race discrimination, federal officials announced on Jan.11.

Retaliation charges rose to 36.3 percent of the agency's 2010 charges, with 36,258 charges filed in the fiscal year. That's up from 33,613 in 2009. The number of race discrimination charges filed with the agency rose as well – up to 35,890 from 33,579 in 2009- and represented 35.9 percent of charges filed with the agency. In 2010, both retaliation and race discrimination were filed in 36 percent of charges.

The continue rise in retaliation claims should be a surprise, according to Don Livingston, an attorney with Akin Gump in Washington, D.C., and former general counsel with the commission. Retaliation can be asserted under all of the anti-discrimination laws. Moreover, the standard for retaliation claims "has been softened to the point where all sorts of workplace interactions could be viewed as retaliation," he said. And the U.S. Supreme Court's decision in *Burlington Northern v. White* broadened the types of actions by an employer that could be viewed as actionable retaliation.

Prudent employers will think about the possibility of retaliation claims at all times when interaction with potential charging parties, Livingston said. Whether they administer discipline, change an employee's assignments or move an individual's office, employers should be able to document the bona fide reasons for taking these actions.

By Allen Smith, J.D.
SHRM's Manager of workplace law content.

Title VII Protect Third Parties From Retaliation

The U.S. Supreme Court on Jan. 24 decided that a worker who claimed that he was fired because his fiancée had filed a sex discrimination claim against their mutual employer had a cause of action for retaliation under Title VII.

The 6th U.S. Circuit Court of Appeals had ruled that Eric Thompson, a former engineer for North American Stainless LP who was fired three weeks after the company received notice of his fiancée's discrimination charge, had no claim under Title VII because he never engaged in a protected activity under the retaliation provision of the law.

The high court, in an 8-0 decision written by Justice Antonin Scalia, reversed the 6th Circuit's ruling. Justice Elena Kagan took no part in the consideration or decision of the case. The high court ruled that, assuming the facts alleged by Thompson were true, his firing constituted unlawful retaliation.

The court noted that it held in the 2006 case *Burlington Northern v. White* that Title VII's anti-retaliation precision must be construed to cover a range of employer conduct. That provision prohibits any employer action that might dissuade a reasonable worker from making or supporting a discrimination charge, the court ruled in *Burlington*. Further, the test must be applied in an objective fashion.

A "reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired," the court stated.

- Joanne Deschenaux

In observance of Memorial Day, our office will be closed on Monday, May 30th

What People in the Know are Saying About ORCA…

"Thank you so, so much for putting those credit reports together for us! I have made sure that you are advertised in our newsletter that we send out to over 30 organizations in town, as well as to many, many community members. I'll send one your way as well! "

-A.C. Skagit Habitat for Humanity

ORCA 'WISDOM'

"In motivating people, you've got to encourage their minds and their hearts. I motivate people, I hope, by example - and perhaps by excitement, by having productive ideas to make others feel involved." -Rupert Murdoch

The $4.3 Million FCRA Lesson:

One Employer Learns About Criminal Background Checks the Hard Way

Early March, a Cincinnati-based company serving the transportation industry, got a rude awakening from the FCRA in the form of a $4.3 million settlement. The settlement comes as a result of a national class-action suit filed against two sister companies - for obtaining criminal background checks on employees and applicants without their written authorization and denying employment to some applicants without providing a copy of the report. According to the law firm that filed the suit, it's the largest settlement in the history of employment-related Fair Credit Reporting Act (FCRA) claims.

HOW TO AVOID THESE COSTLY MISTAKES

When it comes to the use of consumer reports for employment purposes, the FCRA is boss. Avoid a multi-million dollar fine by keeping a few main areas of compliance in mind.

1.) INITIAL NOTICE & AUTHORIZATION

According to the FCRA, employers must disclose in writing that a consumer report may be obtained for employment purposes before the report is actually procured. In addition, the applicant or employee must provide authorization for the report in writing.

2.) PRE-ADVERSE ACTION

If an employer decides to take adverse action based partially or solely upon information found within the report, it must first notify the applicant or employee. The FCRA requires employers to send a pre-adverse action letter to the applicant or employee along with a copy of the report prior to any adverse action. They must also provide a written description of the person's rights ("Summary of Rights") to obtain and dispute information found in the report.

3.) POST-ADVERSE ACTION

Once an employer has decided to take adverse action and has followed the required steps to notify the person of pre-adverse action, it must then provide the applicant or employee with:

- Notification of the adverse action
- The name and contact information for the consumer reporting agency that furnished the report
- A statement that the consumer reporting agency did not make the decision for adverse action and cannot provide reasons for why the decision was made
- Notification of the person's right to obtain a free copy of the report and to dispute any inaccuracies with a consumer reporting agency.

MANE EVENT

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LEGAL OPINION

Question:

I own a 27 unit apartment building in Kent. I keep getting letters from Comcast about the cable TV. They insist that I sign a new 5 year contact and that this new agreement is required by law. They say I need to sign it to maintain service to my tenants. What is going on? How can I be required to sign a contract? Are its terms negotiable?

[Editor's Note: This question was asked previously. The author's initial response discussed whether landlords were legally required to sign the Comcast "Broadband Service Agreement." This subsequent response discusses some of the objectionable provisions of that agreement.]

Answer:

As a rental property owner myself, I've received dozens of letters from Comcast requesting that I sign and return their Broadband Service Agreement ("BSA"). First, I took issue with the cover letter, which asserts that signing of the BSA is "necessary." They assert that they need me to sign it "in order to operate and maintain the cable system" and that it provides indemnity and liability protection for owners. As I wrote previously, I informed Comcast that I had no intention of signing their form BSA. Since they similarly refused to negotiate its terms with me, I wrote them a short e-mail authorizing Comcast to continue to serve my tenants and I received a response saying that was acceptable to Comcast. In summary, the new BSA was not "necessary."

But why did I make an issue of this? Here is a brief outline of my concerns (please note that there are several forms of BSA in circulation, which differ depending on the size of the property and the franchise area in which Comcast is operating – so be sure to determine if the agreement presented to you differs from the one I received):

Paragraph 1 states that it is a "non-exclusive and irrevocable license" for them to access my property. I object to the irrevocable nature of the agreement. If I decide for some reason that I want them off my property, I want to be able to compel them to move. There is no provision for termination of the agreement in case of redevelopment or remodeling of the structure, changes in unit count, etc…. In summary, the BSA does not contemplate the normal evolution of the property.

Paragraph 2 describes in very general terms the "system" that they may in the future install, but gives me no control over how and where it is to be installed. In the past, I have had problems with Comcast's contractors stapling wires all over the exterior of my building with no thought to aesthetics or maintenance concerns. In one case, they even ran their cable right at ground level through a flower bed! I want to control what they do on my property and I don't want to give them a "blank check" in advance.

Paragraph 3 is the much touted "indemnity" clause that they say is for my benefit. Their agreement to indemnify me is great. But the second sentence contains my agreement to indemnify them from my acts or omissions. I don't want to be taking on any duties toward them, and I certainly don't want to agree to indemnify them. Jumping ahead to paragraph 7, the "limitation of liability" paragraph takes away much of the indemnity obligation that is created in paragraph 3. Paragraph 6 gives the parties very long deadlines to cure defaults under the agreement beyond what I consider to be commercially reasonable.

Paragraph 5 recites a term of fifteen years, which automatically renews for additional five year terms. Fifteen years is way too in the current technology world and I never like automatically renewing contracts. Were Comcast making a substantial investment to cable a new or remodeled building, I would recognize the need to amortize its costs. I've told them that I would consider signing a longer term agreement if they proposed large-scale future investments.

Paragraph 8 allows Comcast eight months after the contact expires to remove the "system" (which is defined in an overbroad manner in paragraph 2). Unless Comcast is spending big bucks to put some new technology in my building, I don't want them to have the right to disturb anything unless I agree to it.

Previously, both on behalf of myself and some of our clients, we prepared a full markup of the BSA, deleting the unreasonable provisions and balancing some of the interests in a manner I consider to have been fairer. In each case, I never received a substantive reply. All that would happen is to receive another similar agreement and cover letter a month later, again asserting that it was "necessary" to sign the agreement.

Since my e-mail which just informed Comcast that they were welcome to keep the existing system in place and that they were welcome to sell cable TV and other services to my residents, I have not heard back from them since. As Martha Stewart is known to say, "that's a good thing." – your cable wiring may remain in place – please do not write me again." I received a response via e-mail stating, "we will note this information for our files."

In a future article, I will review the Comcast BSA agreement and outline the reasons why I refused to sign their agreement.

**Article written by Attorney Christopher Benis, of Harrison, Benis & Spence, LTP. This column does not constitute legal advise. Specific problems require specific solutions.*

Kitchen Safety

Careless cooking is the number one cause of residential fires.

Here are some helpful tips to keep you, your residents and neighbors safe.

- **NEVER** leave your cooking unattended.
- Keep your stovetop and surrounding area clear and clean.
- Always wear short or tight fitting sleeves when cooking. Draping or loose-fitting sleeves can come in contact with burners and catch fire.
- Keep a lid nearby when you're cooking to smother small grease fires. Smother the fire by sliding the lid over the pan and turn off the stovetop. Leave the pan covered until it is completely cooled.
- If you have an oven fire, turn off the heat and leave the oven door closed.
- **NEVER** put water on a grease fire! Water will splatter the grease and dramatically increase the size of the fire.
- **NEVER** try to carry a flaming grease fire outside.
- Double-check the kitchen before you go to bed or leave the house. Make sure all burners, oven and small appliances are off.

For fires that do not go out quickly, evacuate the area, close the door behind you to contain the fire and call 911 immediately.