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Unlawful Retaliation Claims Come in All Shapes and Sizes

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By now, most employers understand that they cannot take adverse action against employees who complain of unlawful discrimination in the workplace. But how about an employee who questions her employer about her retirement account? That was precisely the issue in a recent Nebraska federal court decision, and the outcome should be cause for concern.

In *McKnight v. Brentwood Dental Group, Inc.,* (Case No. 8:04CV642, D. Neb., Dec. 8, 2006), Brentwood Dental Group, Inc. ("Brentwood Dental") operated three dental offices located in La Vista, Bellevue and Omaha. Dr. Michael Obeng served as President of Brentwood Dental. Brentwood Dental employed plaintiffs Lisa McKnight and Janeil Thompson. Brentwood Dental provided its employees with a SIMPLE IRA benefit plan, in which both plaintiffs participated.

In January 2003, McKnight questioned Dr. Obeng about a $1,400.00 discrepancy between her paycheck deductions for the SIMPLE IRA and the amount appearing in her plan account. After McKnight complained about the missing funds, Dr. Obeng gave McKnight a check for $1,000.00 payable to the plan. At a staff meeting held on March 4, 2003, the plaintiffs questioned Brentwood Dental's practice administrator about discrepancies between their wage withholdings and deposits in their IRA accounts. The practice administrator later informed Dr. Obeng that the plaintiffs were upset about how the IRA and other benefits were being handled.

On March 11, 2003, with Larson present, Dr. Obeng met with the plaintiffs and expressed concern about the way the plaintiffs handled their issues and felt the plaintiffs' attitudes affected the staff. Dr. Obeng stated the plaintiffs were ungrateful and unhappy and he could not maintain the plaintiffs' employment if they continued to disparage office policies and benefits. The following day, Dr. Obeng met with McKnight and Thompson separately, terminating McKnight and accepting Thompson's resignation in lieu of termination.

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After filing complaints against Brentwood Dental with the "alphabet soup" of administrative agencies, the plaintiffs filed suit in federal court alleging, among other things, that Brentwood Dental interfered with their protected rights and retaliated against them in violation of the federal Employee Retirement Income Security Act ("ERISA").

Section 510 of ERISA makes it unlawful for an employer to discharge an employee for exercising any right to which the employee is untitled to under a benefit plan or for the purpose of interfering with the attainment of any rights in the future. This section recognizes a claim for wrongful termination where an employee is discharged in retaliation for exercising ERISA plan rights or interfering with future ERISA plan benefits. Like other employment unlawful retaliation claims, in order to be successful a plaintiff must prove that: (1) she engaged in protected activity; (2) she was subjected to an adverse employment action; and (3) a causal connection between (1) and (2) exists.

Brentwood Dental filed a motion for summary judgment seeking to dismiss the plaintiffs' claims, contending that the plaintiffs' mere statements and questions about the SIMPLE IRA plan and deposits did not amount to protected activity under ERISA. On December 8, 2006, Chief U.S. District Judge Joseph Bataillon overruled the motion to dismiss and concluded that a trial should be held. Although the court noted that the case law is split on whether an internal complaint (such as that alleged by the plaintiffs) constitutes "protected activity," the court held that there was a genuine dispute over material facts that required that a trial on plaintiffs' claims be held.

LESSON: The vast majority of state and federal employment laws contain an anti-retaliation provision. While many employees understand that Title VII contains anti-retaliation provisions, more and more employees (and their attorneys) are becoming better educated on the multitude of employment statutes that prohibit retaliation. It is for this reason that retaliation was alleged in 29.5 percent of all claims filed with the federal Equal Employment Opportunity Commission during the most recent fiscal year, *i.e.*, an all-time high. Employers should expect that the number of retaliation claims will continue to rise.

Although it is still possible that Brentwood Dental will prevail at trial, that will only come after the employer has spent countless hours preparing for trial and incurred thousands of dollars in legal fees and expenses. Pro-active employers should consider training management and supervisors on unlawful retaliation and the myriad ways in which retaliation claims can arise. Such preventative training may prevent your workplace from becoming the next recipient of an unlawful retaliation claim.

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