

THE 8TH CIRCUIT PROVIDES EMPLOYERS WITH GUIDANCE ON AVOIDING RETALIATION CLAIMS

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The Eighth Circuit Court of Appeals recently issued an opinion providing employers with an excellent roadmap to avoid liability for retaliation claims asserted by employees terminated for performance reasons.

In *Burkhart v. Am. Railcar Indus.*, the plaintiff's six-year employment was tainted with numerous written disciplinary warnings. In 2003, the employee was issued a written warning stating that she had until the end of the month to improve her work or she would be terminated. In 2004, the plaintiff received a pay increase but was informed that her raise was not merit based and that her job performance remained unsatisfactory. In addition, in 2006, the former employee was disciplined on multiple occasions for performance deficiencies. The last warning occurred at the end of 2006 when the Company's annual inventory revealed \$500,000 of unaccounted material. Accordingly, the employee was suspended for five days and then terminated.

Notably, approximately five months prior to her termination, the plaintiff had complained of sexual harassment by her supervisor. According to the plaintiff, the alleged harasser frequently viewed pornography on his employer-owned computer and would often share sexually explicit images and send inappropriate e-mails to other employees. As a result of the plaintiff's complaint, the Company suspended the alleged harasser for five days, cut off his internet access, and warned him that he would be terminated if he continued to send sexually explicit e-mails. Following the Company's swift actions, the plaintiff conceded that she was no longer subject to further harassment.

In her retaliation lawsuit, the plaintiff alleged that she was terminated in retaliation for lodging a sexual harassment complaint. However, the Eighth Circuit found that the plaintiff failed to establish a *prima facie* case of retaliation because no reasonable jury could find a casual connection between the protected activity (reporting the harassment) and the adverse action (termination). Further, the court found that the employer had proffered a legitimate non-discriminatory reason for the termination.

The Court noted the well-documented history of the plaintiff's poor performance and disciplinary actions preceding the plaintiff's termination. The court specifically noted that the plaintiff's performance issues were well documented prior to her reporting the alleged harassment and that the plaintiff has been previously threatened with termination.

In today's legal climate, employers are often frustrated by a perceived inability to discipline an employee when he or she has recently engaged in a protected activity. However, this recent case serves as a reminder that when performance issues are confronted consistently and disciplinary actions are well-documented, courts are much more likely to rule in favor of the employer.

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