

# MASS HIGH TECH

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## INSIDE LEGAL SERVICES

# Deal carefully with employee complaints

**L**ast summer the U.S. Supreme Court reminded employers that complaining workers must be protected — even if the underlying complaint proves to have no merit. Many federal and state laws prohibit retaliation against employees who complain about alleged wrongdoings such as discrimination, fraudulent accounting practices, false payment claims to the government, or failure to pay wages. An employee can make out a retaliation case by claiming that the employer took “adverse action” against them because they were involved in a protected activity. The U.S. Supreme Court in a 2006 discrimination case involving **Burlington Northern Santa Fe Corp.** provided expansive meaning to the term “adverse action,” to prohibit all employer actions which are “materially adverse” to a “reasonable” employee or job applicant. “Adverse action” is not limited to employer actions that affect the terms, conditions or status of employment, nor is it limited to actions that occur at the workplace. Instead, “materially adverse action” has a broader meaning, which is something more than “trivial harms,” and is to be measured using an objective standard of a “reasonable” employee.

Employers must now be extra vigilant to ensure that a complaint that is without merit does not turn into a viable retaliation claim. This translates into a real problem for a manager facing a situation where an employee may or may not be off-base in their complaint, and an investigation is undertaken that triggers

resentment from other co-workers and managers. In order to avoid a retaliation claim and to show that any change in working conditions is not the result of the complaint, the employer should consider the following practical tips:

1. When conducting investigative interviews, emphasize the seriousness of the complaint, the sensitivity (and confidential nature) of the investigation, and if the complainant’s identity is known, the importance of treating the complainant the same as any other employee. Suggest that employees avoid “water-cooler” gossip about the complaint.

2. Emphasize to supervisors and human resources staff that retaliation does not consist only of actions that affect working conditions, but can take place in the greater social context of the workplace. Courts are ready and willing to look beyond the workday in finding acts of retaliation.

3. Train supervisors and human resource staff members on how to react when a claim is raised. Stress to them the importance of maintaining an open atmosphere and that the complainant not be treated differently than his or her peers.

4. When investigating an employee’s complaint, communicate the complaint only to those supervisors and employees that are on a “need-to-know basis.” The fewer people with knowledge of the complaint, the fewer people the employee can claim participated in retaliatory acts.

5. If an employee has made a complaint, use objective standards to evaluate their annual review, compensation and bonus opportunities. Don’t let the person who was complained about do the review of the complainant unless the review is substantiated by someone else.

The goal is to show that the complainant was objectively and fairly reviewed.

6. Create clear written policies that define the standards used in deciding employee promotions and bonuses, and make employees aware of these policies. Apply these standards consistently when making decisions about compensation, promotion and bonuses.

7. Create a written policy that instructs employees on how to file a claim of discrimination. Establish in the policy that retaliation is prohibited and will be investigated and resolved. Ensure that every employee is aware of this policy. It will be more difficult for an employee to claim later that he was afraid to complain if there is a clear policy against retaliation that has been made available to all employees and is followed.

8. When possible, consider the “healing power of time” when dealing with a complainant you need to fire for unrelated reasons. Even if your motive is not to retaliate, courts will consider the proximity in time of the complaint and the adverse action. You have a better chance of surviving a retaliation claim the longer the time period between the complaint and the change in work conditions.

Employee complaints are inevitable in the workplace. Following these guidelines, however, may help to avoid inevitable retaliation claims, and to defend those which are brought by employees.

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### GUEST COLUMN



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