

Don't Be Naive: Discrimination and Retaliation Claims Are Real

by Rebecca Boartfield

According to the most recent statistics from the Equal Employment Opportunity Commission (EEOC) for fiscal year 2015, discrimination charges filed with the agency against employers totaled 89,385, up from 88,778 the previous year. Notably, 44.5% of the claims filed involved allegations of employer retaliation, and claims of disability discrimination reached a record high. A total of 26,968 such claims were filed, representing 30.2% of total charges.

This upward trend should be a wake-up call for most Dentists.

Many Dentists still mistakenly believe that “at-will” employment is the life jacket that protects them from claims of discrimination or retaliation. *Today, it is a myth to think “at-will” employment is your safety net.*

“At-will” is a common law principle that allows the employment relationship to be terminated by either party at any time, with or without notice and with or without reason. Naturally, most employers conclude this allows them to take any action they choose, without any repercussions.



There are now **numerous** laws that Dentists must consider which supersede “at-will.” These laws protect employees in the workplace and set up what is commonly referred to as “protected classes” and limit the “at-will” principle. Because of these, “at-will” has slowly been eroded; and an increasingly litigious society is wreaking havoc on employers. Today, terminating an employee can open a floodgate of problems for the unsuspecting Dentist.

Discrimination Protections

On a federal level, the following are just some of the applicable laws:

- **Title VII of the Civil Rights Act of 1964:** prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.
- **Pregnancy Discrimination Act:** prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions.
- **Equal Pay Act:** requires equal pay for men and women performing substantially the same work.
- **Age Discrimination in Employment Act:** prohibits discrimination against persons over age 40.
- **Americans with Disabilities Act:** requires employer accommodations for individuals with disabilities.

State and city/county laws recognize the federal regulations and will often enact additional or stricter laws. For example, several states, cities, or counties throughout the U.S. ban discrimination based on sexual orientation. The stricter laws often affect broad numbers of employers. For example, Title VII applies to employers with 15 or more employees, but many states have the same discrimination law which applies to employers with 1 or more employees.

Protections from Retaliation

According to the EEOC, retaliation is when an employer “takes an adverse action against a covered individual because he or she engaged in protected activity.”

Protected activity is generally considered to be the reporting of wrongdoings often referred to as “whistle blowing.” Reporting can occur directly to the employer or it can occur externally to government-type agencies. Employees have the right to report the wrongs they perceive are being committed by their employer, and they are protected by law from being retaliated against by the employer.

Adverse action does not necessarily mean termination of employment; it could be a reduction in hours, demotion, or a cut in pay — basically anything that is harmful in some way to the individual who is the whistleblower.

Extreme caution and care must be taken when issuing disciplinary action or terminating any employee who may have taken measures to stop his/her employer from continuing with his/her possibly illegal actions. The employer must ensure that the issue being addressed or the reason for the termination is performance-related and is consistent with how other staff members have been treated.

Timing (context) and documentation are critical. While it may be the employer was justified in terminating the employee due to performance, the timing of the termination (i.e. shortly after the employee blew the whistle) coupled with lack of documentation to support the legitimate performance-based claim will likely result in the employer losing a wrongful termination lawsuit brought by the employee.

Illegal Discrimination

Simply put, discrimination is treating one employee differently from another. However, it is not unlawful unless it occurs as a result of an individual's protected classification. An employee alleging that illegal

discrimination occurred must: A) be in a protected class, B) have experienced a loss or harm, and C) show a causal relationship between the harm or loss and the protected class status of the employee.



The employee could claim the action was a result of his/her protected characteristic either because it was or because the employer created the perception that it was. For example, the employer, when addressing performance issues with an employee, says, “I think you’re getting too old for this job because you’re not as quick as you once were.” Post-termination, the employee claims the discharge was age-based discrimination, which may or may not be true, but the employer would have to successfully rebut those claims.

Initially, the burden is on the employee to prove the employer unlawfully discriminated by linking together A, B, and C from above and presenting a *prima facie* case. After that, the burden of proof shifts to the employer.

To prevail, the employer must show the decision to take the adverse action was legitimate and non-discriminatory and/or based on business necessity. This is best accomplished by showing consistent management practices that apply to all employees regardless of their protected class status and having the documentation to support the decision that was made.

Protecting Yourself and Your Practice

To prevent problems and protect your practice requires **excellent** documentation. Problems arise when Dentists fail to document or they document in such a way that

it causes more harm than good. Follow these simple guidelines for better documentation practices:

- Document events/situations/problems as often as necessary, which may mean daily. Stay on top of the employee's overall performance in order to correct it and prevent a culmination of events that leads directly to firing.
- Document to manage performance on an ongoing basis, not just to "gear up" for a termination. The most important motive for documentation is to manage and direct employee conduct.
- Document only truthful, factual, and accurate information. Describe behaviors without drawing conclusions. Remove all emotion. Explain the impact on the practice. Avoid inflammatory language, exaggeration, or personal attacks.
- Documentation should be cumulative. Demonstrate through your documentation a pattern of behavior or a failure to improve.
- Document consistently with all employees.
- Capture the employee's signature on the documentation addressing problems beyond simple verbal warnings to avoid a "he said, she said" problem.

FUN! Fact



61% of adults are attracted to somebody by their smile alone.

48% of young adults have untagged themselves from a photo on Facebook because of their **smile**.

The average **woman** smiles **62** times a day. The average man? Only **8** times.

Kids laugh roughly **400** times a day. The average adult laughs **only 15** times per day.



Helpful Hints

The right question to ask before termination is not, "Can I fire him/her?" It is, "**Should** I fire him/her?" You can always fire someone, but the result of that action can be serious liability, so it is best to consider all facts, as well as context, before moving in that direction.

Ask yourself at least six questions before terminating an employee. A "yes" response to any of the following questions could mean your risk for legal troubles is higher and termination should be done cautiously (i.e. consult with a professional before proceeding):

- 1 Is the employee disabled or do you perceive him/her to be? (Pregnancy is considered a disability.)
- 2 Has the employee reported being injured on the job or has a workers' compensation claim been filed?
- 3 Does the employee fall into any protected category for sex, race, religion, age, sexual orientation, etc.?
- 4 Do you know if the employee has filed any claims or lawsuits in the past?
- 5 Is the employee a protected "whistle blower?"
- 6 To the best of your knowledge, is there any reason s/he could possibly file a claim or lawsuit against you?

Conclusion

The financial and emotional impact of fighting a claim or lawsuit of discrimination or retaliation is substantial, win or lose. Understand and know employment compliance requirements, and manage your practice being mindful of anything that could be considered discriminatory or retaliatory. Implement policies and procedures that will build on fair and consistent management practices, document when appropriate, and make decisions based on legitimate job-related criteria and business necessity. By doing so, everyone wins.



Rebecca Boartfield is a Human Resources and Employment Compliance Consultant with Bent Ericksen & Associates, a national Human Resources and Employment Compliance Consulting firm. An HR professional for more than 15 years, Rebecca's specialty is employment compliance and human resources management.

FMI: rebecca@bentericksen.com, 541-685-9003, or www.bentericksen.com.