

# **Grippers, Whiners, and Complainers: Will Your Treatment of a Perpetual Complainer Put Your Business on Trial?**

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## **I. INTRODUCTION**

During the question and answer session in a recent employment law presentation, an exasperated human resources director expressed frustration over the fact that her job was more like running a daycare center than a business that employed adults. Many employees enter the workplace in the current legal environment with the expectation that they, rather than their supervisors, will control the day-to-day activities on the job.

Every employer has employees who are grippers, whiners, and complainers – employees who refuse to follow the rules and constantly complain about everything in sight. These grippers complain about perceived unfair treatment from supervisors directed toward them, as well as their fellow workers. They complain about working conditions, job assignments, personnel policies, production methods, perceived or actual threats and warnings from supervisors or other employees, and any and all managerial decisions designed to improve productivity.

The whiners are generally intelligent and manipulative people who know their legal rights. They may have been involved in past union organizational campaigns or are alleged sexual harassment victims who successfully sued previous supervisor(s) and employer(s). They may be disabled or partially disabled individuals who were injured on a previous job and prevailed in a multi-faceted lawsuit for workers' compensation benefits, retaliatory discharge for filing a claim for workers' compensation benefits and the Americans With Disabilities Act. They may, on the other

hand, simply be disgruntled, troubled, angry people who like to cause strife and turmoil in the workplace. If they put half as much time into performing their job responsibilities as they do complaining about alleged unfair treatment, they might be model employees!

What is an employer to do about a problem employee? You want to be decisive and efficient in addressing the employment issues, but you also want to avoid the potential legal traps that may have been laid for you and your company. You know that employees are armed with newly created weapons under both state and federal law that make every decision you reach a potential legal minefield. Therefore, addressing the complaint or failing to address the complaint may lead to an invitation for a lawsuit. What does the employer do when faced with a difficult employee who will almost certainly seek revenge for any real or perceived adverse decision? What legal problems can the whiners, gripers and complainers create for you and your company? How do you handle these individuals and avoid exposure to legal liability?

The summary and analysis outlined below are intended to describe the various conduct and activities that may be protected by law and provide suggestions for appropriate principles, policies and procedures that may assist you in handling the problems the chronic complainer can create.

## **II. WHEN IS THE WHINER OR GRIPER PROTECTED BY LAW?**

### **A. Laws Governing Decisions Involving Whiners, Gripers and Complainers.**

In addressing the problems and issues that develop, employers must be careful to avoid violating the various state and federal laws that have been enacted to protect employees from discrimination, harassment and retaliation. State and federal statutes and the case law interpreting them must be carefully negotiated when making decisions to hire, discipline, and terminate certain employees. Decisions which appear on the surface to be based upon commonsensical reasons may ultimately be challenged in court or before an administrative agency and result in remedies that may require paying compensatory and punitive damages and attorneys' fees and reinstating already terminated employees. Liability can be triggered under the following statutes and legal theories:

#### **1. Title VII of the Civil Rights Act of 1964.**

Title VII of the Civil Rights Act of 1964, which applies to an employer with fifteen or more employees, precludes discrimination due to an individual's race, color, sex, religion or national

origin. 42 U.S.C. § 2000e, *et seq.* Title VII also contains an anti-retaliation provision which precludes discrimination because an individual has opposed an unlawful employment practice or made a charge, testified, or assisted in an investigation or proceeding in regard to the protected categories. 42 U.S.C. § 2000e-3(a). Similar language can be found in virtually every federal or state statute that prohibits any discrimination or unlawful employment practice. In order to prove a prima facie case for retaliation, a plaintiff must demonstrate that she (1) engaged in protected activity; (2) was subjected to an adverse employment action at the time of or after the protected activity; and that (3) there was a causal connection between the protected activity and the adverse action. O’Bryan v.

KTIV Television, 64 F.3d 1188, 1193 (8<sup>th</sup> Cir. 1995).

**a. Race Discrimination.**

In Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3<sup>rd</sup> Cir. 1996), a supervisory employee alleged retaliatory discharge in response to her complaints about race discrimination in the workplace. The employee had voiced concerns that a fellow employee was being treated unfairly in connection with a pending EEOC charge and complained to management that racial problems were getting out of control. The court held that her subsequent discharge for failure to participate in a deposition in connection with the pending EEOC matter stated a claim for retaliatory discharge. The court noted that the employee had engaged in protected activity when she complained about race relations in the workplace, thus transforming her discharge for failing to participate in the deposition into an adverse employment action against her because she had engaged in protected activity.

In dealing with the chronic whiner and complainer, an employer can find no comfort in the fact that the underlying complaint is unfounded. Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3<sup>rd</sup> Cir. 1993). There is no requirement that the underlying charge be true. The employee is required only to prove that he had a “good faith” or “reasonable” belief that discrimination occurred in the workplace in some form. The “good faith” belief is enough to legitimize any protest or act in response to even perceived discrimination. Therefore, even if the underlying charge is resolved in

the employer's favor, the retaliation claim still may succeed. Similarly, a threat to file an "equal opportunity" suit without reference to the specific discrimination may, and probably will, constitute protected activity. Morales v. Merit System Protection Board, 932 F.2d 800 (9<sup>th</sup> Cir. 1991). Therefore, even a general complaint about discrimination can constitute protected activity and should put the employer on guard.

Another stumbling block for employers concerning retaliation allegations can be found in the Supreme Court's decision in Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997), which broadened the definition of "employee" to include former employees. Therefore, if an employee had engaged in protected activity during his employment by making a complaint about discrimination and the former employer gives a poor reference to an employee's prospective employer, the former employer could face a retaliation claim under Title VII. Accordingly, an employer cannot afford to carry a grudge or blacklist a complaining employee even after the employee has departed the premises.

**b. Sex Discrimination, Sexual Harassment and Pregnancy Discrimination.**

As with a complaint based upon race discrimination, a gender discrimination complaint can also be a basis for a retaliatory discharge claim. Dibble v. Regents of the University of Maryland System, 89 F.3d 828 (4<sup>th</sup> Cir. 1996). In Dibble, a female employee complained that her employment contract was not being renewed due to her sex. Her suit for retaliation failed, however, because the employer could demonstrate that the decision not to renew her contract predated her discrimination complaint. Accordingly, there was no causal connection between the protected activity (filing a complaint) and the adverse action taken by the employer (the failure to renew her contract).

Based upon the rationale in Dibble, an employer must be particularly careful in assessing the proper way to handle a sexual harassment claim. These allegations generally involve a credibility

battle between two individuals. If an employer makes a decision that has an adverse impact (such as termination, demotion, transfer, etc.) upon an employee who submits a harassment complaint, the employer will risk a claim for retaliation based upon sex discrimination. *See Fernet v. Crafts Inc.*, 895 F.Supp 668 (D. Vt. 1995). In *Fernet*, an employee successfully claimed that her employer retaliated after she filed a sexual harassment claim. The adverse action involved transferring the employee's boyfriend to another department in the plant. Although the adverse action was not taken against the employee, she argued successfully that the transfer was solely to negatively impact her life. A similar result occurred in *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10<sup>th</sup> Cir. 1996), where an employee was disciplined for reasons unrelated to the substantive complaint concerning discrimination and was also demoted for lying in her deposition. Although the employee was apparently guilty in both instances, the court concluded that there was sufficient evidence that the employer had a retaliatory motive to submit the issue to a jury.

The foregoing cases demonstrate the irony and legal pitfalls that an employer may face in dealing with the classic whiner and complainer. Even when the employer's decision concerning the whiner's complaint appears to be justified, the employee may later have a successful retaliation claim against the employer for making the complaint.

Another concern for employers in the sex discrimination context is the fact that the Pregnancy Discrimination Act of 1978 ("PDA") precludes discrimination and retaliation against employees for registering complaints based upon pregnancy discrimination. The PDA is incorporated into Title VII pursuant to 42 U.S.C. § 2000e(k). Similarly, the Equal Pay Act ("EPA") prohibits retaliation against an employee who files a complaint charging unequal pay based upon sex. 29 U.S.C. § 206(d).

## **2. Age Discrimination.**

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits discrimination because of age and applies specifically to individuals who are at least forty years old. 29 U.S.C. §

621 *et seq.* The ADEA governs employers with twenty or more employees and includes a provision prohibiting an employer from retaliating against employees who make complaints and charges concerning age discrimination. 29 U.S.C. § 623(d). In Hedgepeth v. Kaiser Foundation, 76 F.3d 386 (9<sup>th</sup> Cir.), the Ninth Circuit held that a nurse raised a triable issue as to whether she was discriminated against for engaging in protected activity when she merely *threatened* to file a grievance after an incident alleging age discrimination. Her plans to register a complaint constituted protected activity under the ADEA.

### **3. Americans With Disabilities Act.**

The Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, protects employees with disabilities from job discrimination. A disability under the ADA is “physical or mental impairment that substantially limits one or more of an individual’s major life activities.” 42 U.S.C. § 12102(2)(A). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). The ADA requires employers with fifteen or more employees to provide a reasonable accommodation to employees with disabilities if the accommodation would enable them to perform their essential job functions. 42 U.S.C. §§ 12111(5)(A), 12111(9). As in the federal statutes mentioned above, the ADA also prohibits retaliation against employees who register complaints or file charges based upon disability discrimination. 42 U.S.C. § 12203(a).

To avoid possible liability for retaliation under the ADA, an employer would be well advised to exercise extreme caution in dealing with requests for reasonable accommodation from employees claiming to be disabled. The patience required is highlighted in Willis v. Conopco, Inc., 108 F.3d 282 (11<sup>th</sup> Cir. 1997). Willis, an employee in the laundry detergent packing plant at Lever Brothers, a Conopco subsidiary, received a medical diagnosis that her persistent cough and skin rash was caused by a sensitivity to certain enzymes contained in detergent. Lever Brothers transferred her from the plant’s packing area to the spare parts department where enzyme levels had been reduced.

She was also provided a mask to wear when crossing the packing area and was permitted to park her car in a space where she could avoid that area. She also was excused from attending meetings in higher enzyme areas and offered help in monitoring her pulmonary functions.

Willis sought another opinion from a doctor who practiced “environmental medicine” – a medical discipline the court found lacked scientific validity in the “mainstream” medical community. The doctor concluded that Willis’ immune system was abnormal and was not safe anywhere in the building, which resulted in her refusal to return to work unless her work area was enclosed and air-conditioned.

The employer arranged for Willis to be evaluated by a pulmonologist who determined that Willis “was fully capable of continuing to work in the plant.” Lever Brothers informed Willis that if she failed to return to her next scheduled shift, she would be deemed to have abandoned her job and would be terminated. Willis did not return to work and was terminated.

The trial court granted Lever Brothers’ motion for summary judgment and the Eleventh Circuit affirmed the decision. The appellate court held that Willis did not meet her burden to demonstrate that a reasonable accommodation could have been made which would have allowed her to perform the essential functions of her job. More specifically, the evidence demonstrated that her proposed accommodation to enclose and air-condition the spare parts area would still have exposed her to detergent powder; therefore, she could not have worked in the spare parts department without being exposed to enzymes. Also, she failed to offer any evidence to contradict the pulmonologist’s testimony that she was able to continue to work in the plant. Accordingly, she failed to sustain her burden to produce evidence that she could perform her essential job functions with or without a reasonable accommodation.

The foregoing patience and persistence demonstrates that an employer faced with a whiner’s complaint under the ADA can be rewarded with a favorable court decision. However, it also demonstrates the degree to which the employer can be held hostage to a legal system that

affords protection to the chronic complainer. It further reflects that the employer must be prepared to invest time, effort and expense to prevail under the law.

#### **4. The Family and Medical Leave Act.**

Employers with fifty or more employees are required to provide eligible employees with unpaid leave of absence for up to twelve work weeks for child birth/newborn care, an employee's serious health condition or for the employee to provide necessary care for a family member with a serious health condition. 29 U.S.C. § 2612(a), 29 C.F.R. § 825.200. The Department of Labor has issued detailed regulations which address many issues arising under the Act. 29 C.F.R. § 825.100 *et seq.* These regulations are complex and should be reviewed in answering questions as to the FMLA's scope and application.

For present purposes, it is important to focus upon the areas in which the unwary employer could face problems with the manipulative complainer. The definition of, and circumstances constituting, a "serious health condition" can easily set the stage for a cat and mouse scenario. At first blush, this term as defined in the regulations seems relatively simple: it is an illness, injury, impairment, or physical or mental condition that involves in-patient care in a hospital, hospice, residential medical care facility, or continuing treatment by a health care provider. In-patient care requires an overnight stay. 29 U.S.C. § 2611(11), 29 C.F.R. § 825.114(a)(1). Also, a serious health condition is established if an employee is under a health care provider's care and has an incapacity to work for more than three consecutive days. 29 C.F.R. § 825.114(a)(2)(i)(A); George v. Associated Stationers, 932 F.Supp 1012 (N.D. Ohio 1996).

The FMLA's application becomes confusing when the employee requests intermittent or a reduced leave schedule. 29 U.S.C. § 2612(b); 29 C.F.R. § 825.203(a). There is no limit on the time increments under these circumstances. 29 C.F.R. § 825.203(d). Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned or unanticipated medical treatment or recovery from a serious health condition. For example, it may be taken to provide care or psychological comfort to an immediate family member with a serious health condition. 29 C.F.R.

§ 825.203(c). Moreover, an employee with a migraine headache condition who receives continuing treatment on more than two occasions and cannot perform her job functions while suffering from the migraine will be entitled to a leave of absence for her serious health condition. Hendry v. GTE North, Inc., 896 F.Supp. 816 (N.D. Ind. 1995).

While the FMLA is clearly well-intentioned, its application can be extremely burdensome for many employers. Absences based upon a serious health condition and intermittent leaves provide many opportunities for the whiner and complainer to manipulate the system. Employers subject to the FMLA will be entering a legal minefield when they discipline an employee for excessive absenteeism or unexcused absenteeism because the employee is attempting to exercise his/her rights under permissible leave policies. It is important to remember that a covered employer cannot interfere with, restrain or deny an employee's attempt to exercise any right the FMLA provides. 29 U.S.C. § 2615(a)(1).

Prohibited conduct under the FMLA includes refusing to authorize FMLA leave, discouraging an employee from using FMLA leave, denying benefits to employees for taking FMLA leave, and using the fact that an employee has taken FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions. 29 C.F.R. §§ 825.220(b),(c). Moreover, the FMLA prohibits an employer from discharging or otherwise discriminating against any individual who opposes any practice the FMLA makes unlawful. 29 U.S.C. § 2615(a)(2)(b). Nevertheless, the FMLA does not preclude an employer from implementing business decisions applicable to all employees. For example, it is legal for an employer to lay off an employee who is out on family medical leave pursuant to a legitimate reduction in force if the employee is within the overall group that is to be laid off. Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7<sup>th</sup> Cir. 1997).

The FMLA requires employers to return an employee to the same or equivalent position after the employee has exhausted his/her available FMLA leave. 29 U.S.C. 2614(1); 29 C.F.R. §§ 825.214(a). In McDonnell v Miller Oil Co., 110 F.3d 60 (4<sup>th</sup> Cir. 1997), the Fourth Circuit found

that a company violated the FMLA because it refused to offer an employee her same or equivalent job position upon her return from maternity leave.

## **5. The National Labor Relations Act.**

The National Labor Relations Act, in Section 7, provides employees the right to “form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The section protects specific activities such as forming or attempting to form a union and/or assisting a union to organize an employer’s employees. Additionally, § 7 protects concerted activities which include an employee’s efforts to protect other employees’ employment rights, terms and conditions. Protected concerted activity may include employees’ refusal to leave a jobsite after their shift had ended where the employees were protesting a change in working hours. Overhead Door Corp., 220 NLRB 431 (1975), and employees complaining and protesting about an employer’s drug testing policy and the terminations affecting drug-tested employees. Rockwell International v. NLRB, 814 F.2d 1530 (11<sup>th</sup> Cir. 1987).

Section 8(a)(1) of the NLR Act prohibits an employer from interfering with, restraining or coercing employees attempting to exercise rights guaranteed under § 7. Also, § 8(a)(3) makes it an unfair labor practice for an employer to discharge an employee who engages in union activity or protected concerted activity. A hospital was held to have violated § 8(a)(1) when its employees were told that they could be discharged for engaging in union activities. NLRB v. Shelby Memorial Hospital, 143 LRRM 3062 (7<sup>th</sup> Cir. 1993). Also, an employer was held to have violated § 8(a)(3) when it discharged a truck driver for refusing to accept short-distance driving assignments, because his activity was deemed to assert rights protected under the collective bargaining agreement. NLRB v. PIE Nationwide, Inc., 136 LRRM 2278 (7<sup>th</sup> Cir. 1991).

The foregoing discussion focuses upon the more traditional ways in which a whiner/complainer can abuse the National Labor Relations Act. A more recent or modern tactic can

be found in the salting phenomenon. Salting occurs when a paid union organizer infiltrates a company and becomes employed solely to implement a union organizing campaign. When paid union organizers first appeared at jobsites in an effort to become employees in order to organize the employer's workforce during the early 1990's, employers refused to hire these prospective employees based upon the rationale that they were simply applicants and did not enjoy the protections afforded "employees" under the National Labor Relations Act. However, the U.S. Supreme Court, in NLRB v. Town & Country Elec., Inc., 116 S.Ct. 450 (1995), held that applicants were "employees" under the Act and were entitled to the protections afforded in the National Labor Relations Act.

The National Labor Relations Act and the protections described above give the classic complainer the armor he may need to protest and complain about work rules and working conditions in the employment setting. If you are faced with a "troublemaker" who attempts to bring in a union or engages in conduct that constitutes protected concerted activity not only on his own behalf but also for other employees, you should be extremely cautious and careful in reaching a decision to either discipline or terminate the employee. The decision that appears to be legal on its face may end up creating liability under the National Labor Relations Act.

## **6. The Occupational Safety and Health Act.**

The Occupational Safety and Health Act (OSHA) was passed by Congress in 1970 in an effort to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . ." 29 U.S.C. § 651. Section 5 of OSHA sets forth duties for both employers and employees and requires each employer to comply with occupational safety and health standards promulgated under the statute. 29 U.S.C. § 654. Employers have a specific duty to not only comply with the health and safety standards under the Act, but they also have a general duty to provide a safe workplace for all employees. 29 U.S.C. §§ 651-678. Employees also have responsibilities and duties which include compliance with all applicable OSHA standards as well as all employer safety and health rules and regulations. They also have the right to report hazardous

conditions to supervisory personnel and to exercise their rights under the Act in a responsible manner.

Even if an employer believes that the working environment is safe, an employee has the right to request an OSHA inspection regarding workplace conditions that he believes may violate the OSHA standards or create imminent danger. 29 C.F.R. § 1903.11. This section also provides that the individual's name who registered the complaint will not be published or released if the complaining party requests anonymity.

As under the National Labor Relations Act, the OSHA regulations provide a relatively safe haven for the whiner or complainer who wishes to conjure up the dark clouds that go hand in glove with an OSHA investigation. An employer seeking revenge must be extremely careful, because § 11(c)(1) provides that no person shall discharge or in any manner discriminate against any employee because the employee has (a) filed a complaint under or related to the Act, (b) instituted or caused to be instituted any proceeding related to the Act, (c) testified or plans to testify in any proceeding under the Act or related to the Act, or (d) exercised on his own behalf or on behalf of others any right afforded by the Act. 29 U.S.C. § 660(c)(1).

In Reich v. Skyline Terrace, Inc., 977 F.Supp. 1141 (N.D. Okla. 1997), an employer was held to have violated § 11(c) when it discharged a nursing home supervisor who had filed a complaint with OSHA alleging health hazards. The supervisor had previously filed complaints with two state agencies alleging safety and health hazards and was fired less than two weeks after notifying OSHA about the most recent hazards. Compensatory and punitive damages were assessed against the employer for what the Court deemed a retaliatory discharge.

## **7. The Employee Polygraph Protection Act.**

On December 27, 1988, the Employee Polygraph Protection Act became law. It prohibits most private employers from using a lie detector test for pre-employment screening or in the employment setting; however, there are exceptions for investigations concerning property theft. Section 7(d) provides an exemption for employers conducting investigations over economic loss or

injury. The term “economic loss or injury” includes, among other things, losses or injury to an employer resulting from theft, embezzlement, misappropriation, industrial espionage, sabotage, check kiting, money laundering, or the misappropriation of confidential or trade secret information.

The investigation must be ongoing, and the employer may request the employee to submit to a polygraph test, but only under the following circumstances: (1) the employee had access to the property subject to investigation, (2) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation, and (3) the employer provides the examinee with a statement before the test explaining what is being investigated and the reason the examinee is being tested. The details concerning the EPPA go beyond this presentation; however, you should carefully study its requirements before administering, or hiring an independent contractor to administer, a polygraph test.

The Act provides a safe harbor for the whiner/complainer in that it prohibits employers from suspending, threatening, and terminating the employee for refusing to take or failing any lie detection examination. 29 U.S.C. § 2002. The Act requires that an employer desiring to suspend or even terminate an employee who has taken a lie detector test must have conducted a sufficient investigation that has produced evidence independent of the actual examination. In short, the employer cannot rely on the examination alone in making a decision to discipline the employee because he has failed the exam.

In In re Scrivener Oil Co., 7 I.E.R. 962 (1992), the court held that an employer desiring to terminate an employee who subsequently failed a lie detection examination must have an independent basis for the termination other than merely failing the examination. Similarly, in order to suspend an employee who refuses to submit to a lie detection examination, the employer must have additional supporting evidence, and the discipline cannot be based upon the *per se* refusal to take the examine. In re Robert's, 7 I.E.R. 946, 958 (1992).

## **8. The Fair Credit Reporting Act.**

Prior to hiring a job applicant or promoting a current employee, many employers will conduct background checks to evaluate the prospective job applicant's or employee's qualifications. In dealing with the whiner/complainer, background checks, which can include not only credit checks, but also motor vehicle reports, criminal background checks, among other items, can be particularly helpful.

Effective September 30, 1997, the Fair Credit Reporting Act (FCRA) required employers conducting background checks on employees and job applicants to comply with new requirements when using "consumer reports" or "investigative consumer reports" in making employment-related decisions. A consumer report is generally obtained from a "consumer reporting agency." It summarizes a person's creditworthiness, credit standing, credit capacity, character, general characteristics, or mode of living and can be used in connection with the individual's (the consumer) eligibility for employment. Any report purchased from a third party that touches on the characteristics described above is a consumer report when used to evaluate an individual for employment purposes.

Prior to obtaining a consumer report from a consumer reporting agency, the employer must provide an employee or job applicant with a clear and conspicuous disclosure in a separate document that a consumer report may be obtained for employment purposes. Also, an employer must obtain written authorization from the employee or applicant to proceed with the investigation. Before the employer can take any adverse action against an employee or applicant due to information contained in the consumer report, the employer must provide the employee/applicant the report and a written summary revealing FCRA rights. Adverse employment action includes a refusal to hire a job applicant or a refusal to promote a current employee.

If the employer takes adverse action against an employee or applicant based upon information contained in a consumer report, it must provide the person with the following: (1) notice of the adverse action, (2) the name, address, and telephone number of the consumer reporting

agency that furnished the report, (3) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer with the specific reasons why the adverse action was taken, (4) notice of his/her right to obtain a free copy of the consumer report from the consumer reporting agency within 60 days, and (5) notice of his/her right to dispute the accuracy or completeness of the report with the consumer reporting agency.

In connection with requests for consumer reports, there are certification requirements under the FCRA. Before a consumer reporting agency can furnish a consumer report, an employer must certify to the agency that: (1) the employer has provided the required clear and conspicuous disclosure to the employee or applicant and has received his/her written permission, (2) the employer will not use the information in the report in a way that will violate any applicable federal or state equal employment opportunity law or regulation, and (3) before taking any adverse action based in whole or in part on the report, the employer will provide the employee or applicant a copy of the report and a written summary of his/her FCRA rights.

The FCRA amendments also impose new restrictions with respect to investigative consumer reports. This report includes information that may be contained in a consumer report but which is obtained through personal interviews with neighbors, friends, associates, or other acquaintances of the employee or applicant. As with consumer reports, the new requirements with respect to investigative consumer reports include disclosure, notification and certification provisions. Because investigative reports are deemed more intrusive, these provisions are more detailed and voluminous than traditional consumer reports. Employers are urged to seek legal advice if they currently utilize investigative reports or consumer reports when making employment decisions.

#### **9. Retaliatory Discharge Under the Worker's Compensation Act.**

In addition to possible liability exposure for violating the above-mentioned federal statutes, employers must be careful in making the decision to terminate an employee after he/she has instituted or filed a complaint for workers' compensation benefits. Most states contain similar

provisions and analysis similar to Alabama's. Section 25-5-11.1 of the AlabamaCode provides as follows:

No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c) (4) of § 25-5-11.1.

In Culbreth v. Woodham Plumbing Co., 599 So.2d 1120 (Ala. 1992), the Alabama Supreme Court held that a prima facie case for retaliatory discharge is established if an employee proves that he filed a workers' compensation claim for a work-related injury, that the injury prevented him from working for a period of time, and that when he returned to work, he was informed that he no longer had a job.

In McClain v. Birmingham Coca Cola Bottling Company, 578 So.2d 1299 (Ala. 1991), the Alabama Supreme Court interpreted the term "action" as an employee's claiming or pursuing benefits under the Workers' Compensation statutes in addition to actually filing a lawsuit. Moreover, in Twilley v. Daubert Coated Products, 536 So.2d 1364 (Ala.) the Court expanded the term "terminated" to mean a "constructive termination" under the statute. A "constructive termination" occurs when an employer deliberately makes working conditions so intolerable that no reasonable person could be expected to endure them, and quits. Irons v. Service Merchandise Co., 611 So.2d 294, 295 (Ala. 1992).

The foregoing discussion clearly demonstrates that the Alabama Supreme Court has broadly and liberally construed the meaning and interpretation the retaliatory discharge provision under the Workers' Compensation Act was intended to have. If you are not from Alabama, your state's law is probably similar. This development obviously favors the whiner and complainer. For example, if an employee demonstrates a bad attitude on the job and subsequently becomes injured and refuses to return to work, the employer must be careful in assessing whether to sever the employment relationship. Terminating the employee after he receives an injury on the job can

expose the employer to liability for retaliatory discharge if the termination is not based upon legitimate and non-discriminatory reasons.

### **III. PRINCIPLES, POLICIES AND PROCEDURES IN DEALING WITH GRIPERS, WHINERS AND COMPLAINERS**

#### **A. Hiring and Training Competent Supervisory Personnel.**

Effectively administering personnel policies begins with an employer's management and supervisory personnel. Supervisors must be mature, level-headed and fair-minded individuals. These will be the individuals who will assist you in formulating and implementing personnel policies and work rules, and the rules can only be as good as the individuals who are responsible for enforcing them. Therefore, you do not want to begin with supervisors and managers in your inner circle who themselves are whiners, complainers or gripers. Make sure that you hire supervisory and managerial employees who are loyal, team players and who are dedicated to and believe in your management philosophy. For example, if you want to remain accident free or union free, you should make sure that your supervisors and managers are dedicated to the same philosophy.

Supervisory experience is preferable for all managerial employees. It is a good idea to check references and contact the prospective supervisory employee's previous employer in an effort to learn as much about the person you are about to hire. Inquire about the supervisor's experience in dealing with employee problems and grievances. Make sure that the supervisor has the proper temperament to deal with employees who cause problems and complain. Communication skills are extremely important. In addition to observing the supervisor at the interview stage, check with previous employers to make sure that the prospective supervisor has good communication skills.

#### **B. Supervisory Training and Education.**

Training personnel at the supervisory and managerial level is perhaps the most important step in effectively preparing for problem employees. Supervisors must be trained to handle all possible employment situations, such as hiring, discipline, handling complaints, investigations,

terminations, union activity, to name but a few. In order to effectively deal with the foregoing, supervisors must receive a thorough education in the applicable laws described above. They should have a basic working knowledge about Title VII, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, OSHA, and the Workers' Compensation laws of the state. They should be prepared to answer any and all questions employees present, including gripes and complaints, in regard to work rules, disciplinary actions, absenteeism, leaves of absence and investigations concerning complaints on the job. They must be prepared to think on their feet and avoid misstatements that can lead to legal liability.

The education process for supervisors should also include meetings and seminars. The human resources director should have regularly scheduled training sessions to answer questions the supervisors may have in dealing with legitimate employee problems and frustrating whining and griping. They should receive up-to-date training about recent developments in employment law and techniques to be utilized in carrying out their supervisory duties.

Supervisors should be trained to avoid appearing unfair. Many problems grippers and complainers will present often arise from a perception that the supervisor treats certain employees more favorably. Supervisors should be trained to avoid compromising relationships and situations that may result in a sexual harassment or a union organizational campaign. For example, if an hourly employee questions the supervisor about his rights under the National Labor Relations Act, he should be prepared to give an appropriate response.

Training supervisors should also focus upon how to receive a complaint and respond in a confident and effective manner. Supervisors should be prepared to respond quickly and diffuse any animosity on the complaining employee's part. If employees believe that their supervisors are listening to them and taking a complaint seriously, they may approach the perceived problem with a more cooperative attitude. This approach could avoid an employee converting a relatively minor complaint into full-blown litigation. Moreover, a positive attitude on the supervisor's part may diffuse the complaining party's anger and thus avoid the potential for a volatile situation. Finally,

supervisors must be completely familiar with all work rules and personnel policies. Training supervisors must include comprehensively studying and understanding the employer's handbook and personnel policies.

**C. The Need for a Written Handbook.**

For many years, employers and commentators have debated the positive and negative aspects surrounding written employee policies and handbooks. These documents can be useful tools for employees and employers to understand the company philosophy and its policies, procedures, and benefits. They alert workers as to what to expect from a company; but at the same time, they also delineate just what the employer expects from its employees.

Some employers are fearful that an employee will use handbook language to support a lawsuit against them and, therefore, operate without a handbook. They believe that this affords them maximum flexibility and greater immunity from liability.

These employers fail to realize that poorly defined company procedures and inconsistently enforced work rules will drive employees (particularly the whiner and complainer) to seek an attorney's advice concerning his/her rights and remedies stemming from real or perceived unfair treatment. Therefore, a well drafted and legally compliant handbook can provide management with a common blueprint to operate efficiently, thus establishing an effective shield against a complaint or lawsuit.

While completely analyzing a properly constructed handbook requires more extensive discussion, it is important to focus upon certain basic areas that should be included. First, the format and language should be clear, concise, unambiguous and user friendly. An overly complex and detailed handbook may result in managerial employees failing to understand or follow it. Handbooks should contain legally accurate concepts; at the same time, they should avoid legalese and strive to incorporate plain language. There should be enough information to communicate the company's policies and procedures, but they should not be overly detailed and should not contain confusing or inconsistent language.

To ensure compliance with state and federal law, the handbook should contain an equal employment opportunity statement assuring fairness in regard to hiring, discipline, termination and all employment terms and conditions. The handbook will need sections addressing sick leave, vacation, leaves of absence, fringe benefits, the Family and Medical Leave Act, military leave, jury duty and, most importantly, a policy to address sexual harassment and harassment based upon any protected characteristic. A no harassment policy is absolutely necessary to enable the employer to effectively deal with the whiner and complainer. Finally, the employer should preserve the at-will relationship with its employees by including appropriate disclaimer language expressly instructing that the handbook does not create or constitute a contract. Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987).

While the Alabama Supreme Court held in *Hoffman-LaRoche* that an employee handbook could be construed as a “unilateral contract of employment” absent any disclaimer, the court also cited the following language to constitute an acceptable disclaimer:

This handbook and the policies contained herein do not in any way constitute, and should not be construed as a contract of employment between the employer and the employee, or a promise of employment.

Most states follow the employment at-will doctrine, and disclaiming that a contract has been created is essential to preserving the at-will relationship. The at-will doctrine allows an employer to terminate an employee for good reason, bad reason or no reason at all. Of course, specific exceptions are reflected in federal and state law. Disclaimer language, however, is essential to any handbook to preserve the at-will doctrine as much as possible. Other than suits based upon federal statutes previously discussed, a common theory faced by an employer in state court in the employment context is a breach of contract claim based upon the employment handbook.

In summary, a clearly drafted and consistently enforced handbook will go a long way in helping the employer to effectively counter the chronic whiner and complainer. The best way to avoid manipulation is to implement procedures and work rules in a handbook which can be utilized

and enforced in an impartial manner.

**D. The Hiring Stage: Evaluating and Selecting Employees.**

Perhaps the best way to avoid problems gripers, whiners and complainers may present is to avoid ever having to deal with them. Employers should utilize a preemptive strike and never hire them. Motivation, attitude and teamwork are subjective concepts and are difficult to recognize during a brief interview with a prospective employee who is unknown to the employer. Considering limitations and constraints state and federal law create, a human resource director will have a difficult time in determining whether he is dealing with a person who views the glass of opportunity as half-full or half-empty.

Because the interviewer cannot ask questions concerning prior workers' compensation claims, lawsuits for discrimination, etc., the interviewer will have to evaluate the interviewee and make decisions based upon common sense, intuition, and instinct. Questions related to an employee's willingness to work overtime, and flexibility in regard to job assignments and duties will often reflect a cooperative attitude.

The best way to avoid hiring an unknown commodity is to select your employees from a pool that your current employees recommend or refer who have a good work record. The more you know about the individual, the better chance you will make the right decision during the interview stage. Checking the employee's background and work record through references and former employers can also be helpful. However, you should be aware that most references the prospective employee lists will generally provide self-serving and positive information concerning the interviewee.

**E. The Employment Stage: Effectively Dealing with the Chronic Complainer. 1. Using the Introductory or Probationary Period to your Advantage.**

If you are unsuccessful in detecting the whiner/complainer type during the hiring stage, you may have the opportunity to spot him in the early employment stages known as the introductory or probationary period. Every employer should notify newly hired employees that their employment is

considered to be an introductory or probationary period. Depending upon the time it takes to evaluate newly hired employees, you should set aside approximately 90 to 120 days to properly evaluate each employee's job performance. Detecting and recognizing a problem employee early on will enable every employer to avoid a lengthy and frustrating battle with the chronic complainer. Your supervisory employees should be trained to spot and effectively deal with the whiner/complainer during the probationary period.

## **2. Consistently, Fairly Enforcing the Employment Policies and Procedures.**

Once the whiner/complainer is identified, it becomes extremely important that disciplinary measures are taken with fairness and consistency. Disciplinary rules and policies should have already been published to all employees at the hiring stage. If rules are violated, the problem employee should receive appropriate counseling. It is important, however, to remember that selectively enforcing disciplinary policies, taunting, teasing, and increasing or decreasing work loads should be avoided.

While it is important that supervisory personnel establish a pro-active approach when enforcing personnel policies and procedures, it is important that all work rules should be enforced in a fair and consistent manner. Once the employee receives appropriate counseling, the supervisor should not ignore the employee or treat him in a demeaning way. Although the whiner will make every effort to manipulate the facts involved in whatever incident is being addressed or avoid responsibility with respect to the infraction in question, the supervisor should respond in a calm but forceful fashion.

In dealing with a whiner, the employer should assume that every disciplinary action taken will result in litigation. It is generally preferable that if the whiner is to receive disciplinary action that will result in serious consequences such as a suspension, demotion or termination, two managerial representatives should be present. This will enable the company to effectively confirm the details and corroborate the statements made during the meeting with the employee.

## **3. Proper Documentation is Absolutely Necessary.**

In addition to the fact that employers must consistently and fairly enforce work rules in dealing with the chronic complainer, they must also properly document any and all disciplinary action that is imposed. A progressive discipline system in which the employee receives written warnings for all infractions is preferable. A one, two, three strikes and out approach is highly recommended; however, the employer must *consistently* enforce a three-step warning procedure in order to avoid any appearance concerning unequal or possibly discriminatory treatment. For example, if an employee is chronically late and/or absent and has been verbally warned about these violations on many occasions but has failed to receive any written warnings, the employer has created its own problems. If the employee then makes a sexual harassment claim that is investigated and determined to be unfounded and is subsequently terminated for excessive absenteeism or tardiness, the employer is in the perilous situation of facing a claim for retaliation because the employee never received a written warning for tardiness.

Creating a paper trail through proper documentation is absolutely essential in dealing with the problem employee. If an employee has been identified as a whiner and complainer, a concerted effort should be made to ensure that any performance issues are properly and fairly considered and that the employee receives appropriate counseling and documentation before any adverse action is taken. If a company can maintain accurate and contemporaneous documentation reflecting an employee's problems, it will be in the best position to offer a legitimate, business reason for any action taken against the whiner/complainer. Appropriate documentation is extremely persuasive to a judge/jury in evaluating whether an employment decision was legitimate. Without proper documentation in the employee's personnel file, an employer will be at a distinct disadvantage at the time of trial. A decision to terminate the employee for an offense that requires progressive disciplinary warnings is difficult, if not impossible, to explain without documentation.

#### **4. Handling the Complaint**

In addition to making sure that the employer treats the whiner/complainer fairly to implement disciplinary action, it must also make sure that complaints and problems the

whiner/complainer presents are handled properly. For example, what should the employer do if the problem employee makes a claim for sexual harassment or complains about the work environment as did the employee at the Lever Brothers plant in the Willis case discussed above? As stated previously, supervisory personnel must be trained to properly investigate all complaints. The supervisor should always treat any complaint as serious and worthy of consideration. An effective investigation should include the following:

**a. A Grievance and Complaint Procedure.**

The employer must develop an internal procedure to handle complaints and make certain that its supervisory personnel understand its methodology. The company should decide in advance which persons will investigate the complaints, and these individuals must be educated and trained to conduct a proper investigation. They should be given specific procedures for receiving complaints and responding to those persons who register the complaints. Supervisors must keep all complaints and information gathered concerning the complaints confidential.

The employer should establish a procedure for filing a complaint, and this must be clearly communicated and published to all employees. For example, in a situation involving a harassment (sexual or otherwise) complaint, the employer must develop a written policy concerning the complaint procedure. The policy should designate the person(s) to whom the complaint should be made and the basic methodology that will be utilized in the investigative process.

**b. Interviewing the Complaining Party and Possible Witnesses.**

After receiving a complaint, the person(s) designated to conduct the investigation (preferably the human resources director and an assistant or the charging party's immediate supervisor if appropriate) should interview the charging party and evaluate the circumstances surrounding the complaint. Interviews must be conducted in private and away from the employee work area. The human resources director must emphasize that the complaint will be kept as confidential as possible but that the need for contacting other persons or witnesses will be required depending upon the

circumstances. The human resources director should exercise restraint and demonstrate an appropriate demeanor during the interview process.

After the charging party is interviewed, the wrongdoer and other potential witnesses should be contacted. Facts must be gathered fairly, and the HR person should emphasize the need for confidentiality in order to protect the involved individual's privacy. It is important that the HR director refrain from publishing facts about the investigation to other persons and employees other than the people who need to know or have knowledge relevant to the investigation. If the need should arise, the investigating parties should consult with an attorney . All facts must be considered in conjunction with the applicable legal issues.

**c. Concluding the Investigation: Publication of Findings and Conclusions.**

The HR investigator should carefully consider and review all facts uncovered in the investigation with his/her assistant and management and reach an appropriate conclusion. Depending upon the manner in which the investigation was conducted, management may or may not wish to publish a written report. If a report is prepared, it should be thorough and complete and the author should consider all legal ramifications. The objective facts revealed during the course of the investigation must justify the investigator's conclusion.

All investigations should be conducted in a prompt and effective manner, and the findings and conclusions should be published to the complaining party as soon as possible. When the claim asserts harassment, the alleged harasser should also be provided the findings and conclusions. Otherwise, the report's conclusions must be limited and restricted to those persons in management with decision-making authority. Any publication to persons who are not entitled to receive the information contained in the report could create liability for the employer under common law theories such as defamation, and invasion of privacy.

**d. Circumstances Involving an Informal Investigative Approach.**

Circumstances involving a harassment complaint (sex, race, age, disability, or otherwise) generally will require the foregoing formal investigative procedures. However, there may be

circumstances, as in the case involving the employee who complained about her reaction to detergent, which require a less formal investigative procedure. Less formal, though, does not necessarily mean that the investigation and conclusions should be undocumented. The employee registering the complaint should be assured that his/her complaint will be considered and addressed. Appropriate documentation should, of course, be prepared along the way; however, the degree and amount of documentation will depend upon the complaint that has been made.

If the complaint is questionable and appears to be disingenuous, as is often the case in a complaint registered by a whiner/complainer, appropriate documentation will assist the employer if litigation is pursued. Certainly, the documentation presented to the court in Willis assisted the employer in receiving a favorable disposition of the case before the Eleventh Circuit. Documenting the complaint can help lock the whiner/complainer into a specific theory and preclude allowing the complaint to grow and spread if litigation is pursued.

#### **5. The Need for a Pro-Active Decisive Approach.**

In dealing with the whiner/complainer, your supervisors and managers should be trained to be pro-active and decisive. Perhaps the biggest mistake an employer can make is to prolong or delay his decision on what to do with the chronic complainer. Of course, supervisors should not be aggressive or mean-spirited in their approach. Rather, decisionmaking requires a balanced assessment of the problem to develop an effective plan. Management should not single out the whiner/complainer or selectively enforce its disciplinary policies in dealing with him. The supervisor should identify the problem areas and attempt to develop communication with the whiner in an effort to reach a reasonable solution. If it is impossible to accomplish a reasonable solution, which is often the case with the chronic complainer, the supervisor must follow through with appropriate and progressive disciplinary action. In taking this approach, the supervisor should be prepared to justify all decisions in case he is called upon to defend his actions before an administrative agency or in the courtroom.

### **IV. CONCLUSION.**

Dealing with the chronic whiner/complainer on a daily basis can be an extremely frustrating experience for any employer. The foregoing presentation does not exhaustively examine all applicable state and federal laws, nor does it foresee all the potential problems an employer will face in dealing with its gripers, whiners and complainers. It does cover the most common legal issues encountered and offers a practical approach for the employer to consider in responding to the issues that a problem employee may create in the workplace. A little patience, effort and knowledge will help keep your supervisors from gradually becoming baby-sitters.