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## Retaliation

### **Breaking Bad News to Management Can Be Challenging, Even Dangerous, for HR**

**W**hen senior management's policies conflict with statutory requirements, it is often human resources professionals who get caught in the middle. The good news is that HR can avoid getting stuck between their compliance duties and management's directives by setting up commonsense policies and procedures and effective lines of communication before trouble ever starts, according to employment attorneys interviewed by BNA.

The recent settlement between the Equal Employment Opportunity Commission and the dating service It's Just Lunch USA offers an example of how things can go awry. The firm was charged with not hiring men for sales and dating director positions, and with retaliating against former HR Director Lynda Twist for protesting the policy (31 HRR 764, 7/22/13). It's Just Lunch agreed to pay \$900,000 to settle the claims, with Twist to receive \$130,659 of the payout (31 HRR 794, 7/29/13).

Employment law experts contacted by BNA said that this kind of thing is not an everyday occurrence, but that HR does face risks of retaliation for reporting management misdeeds. Some of HR's exposure comes with the territory, but protections can be built in, they said.

HR professionals, like in-house counsel, "understand that there are times when they won't be the most popular people," J. Timothy McDonald, a partner at Thompson Hine LLP in Atlanta, told BNA July 25. "In larger companies the systems are so entrenched that there isn't much risk for the HR people. It's riskier in smaller companies or family-owned companies, where the emotions of one person may come into play."

"While I don't think there is a widespread fear among HR professionals about speaking up, I don't think anyone wants to be the bearer of bad news," Patty Wise of Niehaus & Associates in Toledo, Ohio, told BNA July 30. "And I think there is a real fear among whistleblowers, even when they ultimately prevail, as Ms. Twist did in the It's Just Lunch case."

**A Question of Culture.** Corporate cultures are an intangible but vital element for creating an environment where HR feels free to bring up concerns without worrying about retaliation, Wise said. The question is, she said, "Is it an open culture where they're truly open to hearing about problems, or a scarier place to work?"

"Whistleblowers who lose their jobs and have to wait months or even years for an unknown outcome are certainly fearful," Wise added. "But in general, all compa-

nies must have a prohibition on retaliation for just these types of situations. And so often it will come down to the culture of a company, and whether they foster honest dialogue."

From the perspective of an experienced HR professional, the problems that do occur tend to arise in companies that are undergoing an internal crisis, Robert Miller of the Society for Human Resource Management's Special Expertise Panel on Labor Relations in Santa Fe Springs, Calif., told BNA July 29.

"Most of my career is related to doing reorganizations where employers have structural, internal problems," Miller said. "Often there is a disconnect between some compliance issues and what management would assert," he said, "for example, hiring practices that are not quite compliant. A lot of times, management is a little bit fluid in how they will pursue compliance."

In such situations, the HR professional may be seen by management "as the bad guy or the cop," Miller added.

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Christine Lyon of Morrison & Foerster in Palo Alto, Calif., told BNA July 25 that HR professionals are highly capable of avoiding potentially retaliatory scenarios. "This is due to a couple of factors," she said. "HR is usually very aware of their protections under the anti-retaliation laws, and HR leaders usually don't take on these issues alone."

"They are good at building consensus," Lyon said. "HR people are good problem solvers," she added.

Michael Cohen, a partner with Duane Morris LLP in Philadelphia, said that likewise, most employers are not looking to punish HR for raising concerns. "In most situations with my [employer] clients, they want things to be handled the right way," he told BNA July 26. "They don't want the legal exposure and adverse publicity that comes with certain kinds of claims. So they won't put HR in the kind of position where they don't know if they should be reporting something."

Beyond any legal exposure for employers, Cohen said, "there is the practical issue of an organization's

completely losing credibility when it starts treating HR badly.”

**HR’s Legal Cover.** McDonald noted that HR professionals have the same statutory protections from retaliation as any other employees.

He noted, however, that HR may not be protected from concerns it raises as part of its day-to-day duties. “If the human resources director thinks that the company’s handling of a particular discrimination issue involving other employees was poor and raising those concerns are part and parcel of the job duties of the human resources director, then many, but not all, courts would hold that the human resources director is not engaging in protected conduct,” McDonald said.

State courts may see matters differently depending on state law, however, McDonald said, citing *Lodis v. Corbis Holdings Inc.*, a case decided Jan. 14 by the Washington State Court of Appeals. In that case, Steven Lodis, who was fired as vice president of worldwide human resources for Corbis, a digital photography and stock images company, sued his former employer and its CEO for age discrimination and retaliation.

According to the appeals court’s summary, a trial court granted Corbis’s motion for dismissal of Lodis’s retaliation claim “because Lodis did not ‘step outside’ his ordinary job duties when he engaged in the activities for which he alleges retaliation.” The appeals court reversed that part of the lower court’s decision and remanded it, asserting that “we decline to read into the statute a requirement that an employee step outside his ordinary job duties as a prerequisite to claiming retaliation.”

For McDonald, “it’s a good reminder that as an HR person or aggrieved employee, you should check your state laws.”

**Lay a Solid Groundwork.** To avoid conflicts with senior corporate leaders and establish an honest and open relationship, Cohen said, the prudent HR professional starts at the beginning. “You have to have established relationships” with management before trouble ever starts, he advised. This means demonstrating the value of the HR function to senior executives, Cohen said.

Compliance is the basic rule, according to McDonald. “The first thing you have to do is make sure you’re following the policies you’re supposed to,” he said. “If you’re not getting the support you need from senior management—this may be easier said than done—but you should be looking elsewhere.”

It’s HR’s job to make sure the proper methods are in place to deal with complaints, Linda Dwoskin, an associate with Dechert LLP in Philadelphia, told BNA July 25. “HR has a key role in establishing policies and pro-

cedures for individuals to ensure a culture of compliance, so that there is no retaliation and an individual doesn’t have to go running to the government,” she said.

“It benefits HR themselves if they have done that, so that managers are sensitized,” Dwoskin said. “It’s important for the HR person to be proactive, setting up hotlines.”

Similarly, Lyon said there must be “a very strong policy allowing people to report their concerns and know where to report them—if the concern is about one’s manager, one is free to talk to other people or HR. More generally, you should have an open-door policy in the employee handbook.”

“From the HR perspective, they need to be proactive so they can take advantage of the mechanisms they have established,” Dwoskin said. “There’s no panacea, but at least they can have executives think through their legal obligations.”

**Raising Concerns to Management.** When a problem does arise, a lot depends on how the HR professional addresses it. Sometimes nervous HR professionals will check with counsel before going to the executive suite, Paul Cowie, a partner at Sheppard Mullin Richter & Hampton LLP in Palo Alto, Calif., told BNA July 29. He said HR may say, “I have to bring this to the CEO’s attention—how should it be done?” Cowie added, “It often comes down to framing the issue.”

For extra protection, if management is unlikely to be sympathetic, an HR professional at a public company can present the problem to the board of directors—if need be, anonymously, Miller said.

“You have to present things to management in a prudent manner,” Cohen said. “Don’t create [unnecessary] documentation that can cause legal liability down the road where there may not have been any.”

“It’s important to be careful how you voice your concerns, saying things in a way that doesn’t have a manager getting their back up,” Dwoskin said. “If you are an HR professional, you are a business executive,” she said, so be clear and unemotional, “and do not make accusations in a nasty tone.”

Miller said HR may need to clearly explain a problem to top management. For example, he said, “maybe management doesn’t understand how to go about recruitment, so your job is to educate them.” Still, Miller allowed, there are times when clearly management has misbehaved. If as an HR professional you find that an illegal corporate policy or practice is “intentional,” he said, then “you have a decision to make.”

By MARTIN BERMAN-GORVINE