

# Retaliation in the Workplace

*Strategies for avoiding the danger of retaliation lawsuits*

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Retaliation is difficult to define. Usually it is an adverse action taken by an employer against an employee resulting from some form of discriminatory conduct. Typically, retaliation claims are easy to prove by the employee. It can arise in a variety of settings ranging from a change in employment up to the termination of an employee. Retaliation is also specifically proscribed by Title VII, the Age Discrimination in Employment Act (ADEA), the Americans With Disabilities Act (ADA) and 42 U.S.C. §1981. Since almost all states have laws prohibiting retaliation against complaining employees, it is an important concept for employers to understand.

The Equal Employment Opportunity Commission (EEOC) takes retaliation very seriously and can be expected to pursue retaliation claims on behalf of individuals who alleged they were kept from, penalized or had their employment altered for opposing unlawful conduct.

This chapter will present the basic structure for a retaliation case, who can sue and what qualifies as an “adverse action.” It will also highlight the two categories or types of conduct – free access or opposition conduct – that qualify for protections against retaliation. Employers will be surprised to learn that not only are employees protected from retaliation under these laws, but so too are former employers and even job applicants. It is even possible for an individual to prevail on a retaliation claim if the underlying discrimination claim fails.

Although employers cannot prevent discrimination complaints entirely, they can control how they respond to these complaints when they do arise.

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## What Is Retaliation?

The most obvious and general goal of federal and state anti-discrimination laws is to transform the American workplace into one free from barriers to employment. Laws such as Title VII, the ADA and the ADEA arose from Congress's realization that for many, there were hurdles facing employees as they tried to advance in the workplace. As part of their efforts, these federal and state laws have included provisions that prohibit an employer from taking retaliatory action against an employee for exercising their rights under the law.

As used in our everyday vernacular, retaliation is essentially the concept of "paying back" someone for injuring you. That definition is not far off from what often occurs in the employment setting. For example, assume an employee complains about what she believes was sexual harassment by her supervisor and she in turn is labeled as troublemaker for speaking up, or even fired for being insubordinate. Congress recognized that the only way it could eradicate discrimination from the workplace was by first creating a statutory framework that would allow employees to voice their complaints or concerns without fear of reprisal or "retaliatory conduct."

For a statutory definition of "retaliatory conduct" it is useful to consult the language of Title VII itself since this statute is used as the basis for interpretation of the majority of other federal and state anti-discrimination laws. Section 704(a) of Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

The ADA and §1981 both contain language closely mirroring that of Title VII, as do other state anti-discrimination laws. Since all but a few states have their own laws prohibiting discrimination, the majority of employers in America must also be mindful that retaliation will not be tolerated.

In addition to the prohibitions created by federal and state anti-discrimination laws, some jurisdictions have enacted "whistleblower" statutes that prohibit retaliation against an employee who challenges conduct he/she feels is in violation of public policy. These laws are an important addition to the area of employment law as they further limit the concept of employment "at-will." These laws prohibit an employer from discharging, demoting or otherwise taking adverse action against an employee because he or she has engaged in conduct protected by a statute, public policy and/or case law. These types of laws are perhaps the most important for employers as they are often less obvious than those attached to anti-discrimination statutes and can be easily overlooked.

## What Types of Conduct Are Protected?

### ***Protections for "Free Access"***

The easiest instances to identify "retaliation" occur where the employee attempts to invoke the assistance of the EEOC or other state civil rights organization and

that the employee's position is somehow altered and/or the employee is subsequently fired from his or her position. In such instances, the employer's adverse action is said to deny the employee's "free access" to those rights guaranteed by Title VII, §1981 or the ADEA. The prohibitions against retaliation for an individual's "free access" to these rights extend to the filing of a charge of discrimination with the EEOC or a civil lawsuit. The employee's rights to complain about discrimination may even extend to an internal complaint made to the company.

Although most employers recognize that they cannot terminate or otherwise discriminate against an employee who has filed a complaint, the laws' protections extend to many other, less obvious types of conduct. For example, several jurisdictions have also extended the laws' protections to employees who have participated in a proceeding by either gathering evidence in anticipation of it or by giving testimony during the proceeding itself. Although these are federal laws, their protections have also been found to extend to participation in state agency proceedings.

#### Invoking Assistance Triggers Protection

Employers must be mindful that any attempt by an employee to invoke the assistance of a federal or state regulatory agency can qualify as "participation" under the law. In certain instances, letters written to the EEOC have even been held to constitute "participation."

Even if the employer is ultimately determined not to have committed the discriminatory acts alleged, the employer may not seek to discipline the complaining or participating employees. In particular, allegations made by the employee(s) during such participation – even if false or malicious – may be protected. However, the employer is not left without any recourse since the employee(s) may be liable for a potential defamation claim under state law for statements made by the employee during non-judicial proceedings.

#### Protections for "Opposition"

In addition to protections for "free access," the statutes also provided protections against what many courts have termed "opposition" conduct. This includes a myriad of different types of conduct, but all share one important element: To be protected, the employee must have a good faith belief that the practices being opposed are unlawful and that there is a reasonable basis for that belief. As such, an employee may be protected from opposing employer practices even if it is ultimately determined that the practices were neither illegal nor discriminatory.

This "reasonableness test" is also used to determine whether the employee's conduct qualifies for the statutes' protections. Reasonable opposition has been found to include:

- verbal objections to supervisors;
- filing complaints with civil rights agencies or labor organizations;
- circulating petitions;
- writing letters to legislators;

- publishing advertisements; and
- making statements to the media, or engaging in lawful concerted activity such as striking or picketing.

However, “stall-ins” that block access to the premises or work stoppages that violate collective bargaining contracts or federal labor laws have been denied protection.

In contrast, an employee’s opposition that violates either a law or the employee’s duty to the employer has been found to be outside the protections of the statutes. For example, protected activity does not include:

- the refusal of an individual to work because of alleged discrimination;
- copying and/or distributing confidential documents of the employer in such a way that breaches the employee’s duty of confidentiality owed to the employer;
- conduct that gratuitously undermines a supervisor’s authority; or
- conduct, such as trespass and other violent behavior, that leads to physical or property damage.

While a perceived “disloyalty” is not a basis for making employee opposition unprotected, an employee may not make false and malicious public statements, maligning the product of the employer and/or disrupting the work of other employees.

### **What Type of Acts Constitute Retaliation?**

While the statutes clearly prohibit retaliation against an employee for challenging the employer’s discriminatory conduct, they provide no guidance as to what constitutes “retaliation.” Generally, any adverse action taken against an employee “because of” the protected conduct is prohibited. Interestingly, an employee does not need to prove that the employer had an animus against him or her as they would to succeed on a claim for discrimination. Rather, they need only demonstrate that they were retaliated against for challenging the employer’s conduct. Thus an employee could fail on his or her claim for racial discrimination, but succeed on a separate claim for retaliation by proving that the employer took an adverse action because of a complaint to the EEOC.

To be considered an “adverse action,” the employer’s conduct must affect a term or condition of employment. Currently, there is a split between the federal courts as to whether there must be a physical or tangible denial of job benefits. Courts that narrowly define “adverse action” require either a dismissal, demotion, reduction in compensation or significant reassignment. Other courts, which interpret “adverse action” broadly, have found that actions that potentially restrict the employee’s prospects or constitute a pattern of petty indignities are prohibited. Employers in these jurisdictions may even be found to have retaliated against an employee after he or she has left the company if the employer provides unjustifiably negative referrals to potential employers.

## Proving Retaliation

An employee need not succeed on an underlying claim for discrimination to prevail on a claim for retaliation. However, the test for proving retaliation is very similar to the test used to determine whether an employee has been discriminated against because of some invidious classification. To prove retaliation, the employee must demonstrate that:

- he or she had engaged in a protected activity (either the “free access” or “opposition” type conduct described above);
- he or she suffered an adverse employment action; and
- there was a causal connection between the protected conduct and the employer’s reaction.

The employee is said to have a burden of persuasion – he or she must persuade the fact finder that each of the elements has been met.

The key element in proving a retaliation claim is that the employer intentionally sought to strike back against the employee by somehow altering the employee’s employment. This will usually turn on the causal connection between the employee’s protected conduct and the employer’s adverse action. An employee must demonstrate that the employer was aware of the protected conduct at the time it made its decision and that there was some proximity in time between the conduct and the adverse action. The employee may also demonstrate this causal link by introducing evidence that establishes different treatment for those employees who did not engage in a protected activity, or who had engaged in similar but non-protected activities but who were not the subject of an adverse employment action.

If the plaintiff-employee makes this showing, the burden then shifts to the employer to produce some legitimate, non-discriminatory reason for its action. The employer’s burden is less than the employee’s burden – it must only state a legitimate reason for its action. Having done so, the case shifts back to the employee to demonstrate to the factfinder that the employer’s stated reason is “pretextual” – a more demanding burden of persuasion than the one placed on the employer.

## Protections Under Other Federal Laws

### *Family and Medical Leave Act*

Under the Family and Medical Leave Act (FMLA), qualifying employees are entitled to up to 12 weeks of unpaid leave during a 12 month period because of:

- their own serious health condition;
- the serious health condition of a spouse, child or parent; or
- the birth or adoption of a child.

Employers are generally required to maintain existing health care benefits for the employee during the leave period. Upon the employee's return to work, the employer must restore the individual to the same or equivalent position with similar pay, benefits and working conditions. An employer's failure to provide an employee with FMLA leave or its failure to restore the employee to the same or equivalent position may be viewed as retaliatory conduct.

### **False Claim Act**

The False Claim Act (FCA) encourages federal government employees, and other private employees whose employer receives federal funds – such as defense contractors or health care providers – to come forward with evidence of fraud against the federal government and some state programs by empowering these employees to file lawsuits on behalf of the federal government. Specifically, the FCA provides “any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section... shall be entitled to all relief necessary to make the employee whole.” To state a claim for retaliation under the FCA, the employee must demonstrate that he or she engaged in protected conduct and that he or she was discriminated against because of this protected conduct. Where the employee has not gone so far as to formally file a lawsuit, he or she must demonstrate that the employer was notified of the “distinct possibility” that a FCA lawsuit was contemplated.

### **Employee Retirement Income Security Act of 1974 (ERISA)**

The purpose of ERISA was to provide minimal standards of fiscal responsibility for benefit and pension plans. Similar to the FCA, ERISA provides a private cause of action to a plan's participants (the employees), fiduciaries, or beneficiary for violations of the law or improper management of the plan. Employees are similarly protected from retaliation for bringing a lawsuit or threatening to expose the violation. Additionally, an employee is protected from retaliation for exercising any right he or she has under the plan. An employee who has been retaliated against may seek recovery of lost benefits, back pay, reinstatement or front pay, as well as attorneys' fees and costs.

### **Occupational Safety and Health Act**

The Occupational Safety and Health Act (OSHA) provides minimum standards for occupational health and safety and prohibits employers from discharging or discriminating against an employee for:

- filing a complaint or otherwise instituting or causing to be instituted any proceeding under the law;
- testifying or being about to testify in any proceeding under or related to the law; or
- exercising on his or her own behalf or of others any right afforded under the law.

One such right is that an employee may refuse to perform tasks where there is a reasonable apprehension of serious injury. If an employee can demonstrate that he or she was discharged or otherwise discriminated against in violation of the law, he or she may have a cause of action for retaliation in violation of OSHA. An employee may recover back and front pay or be reinstated to his or her former position.

## Conclusion

Employers should be mindful of the dangers presented by retaliation suits, particularly because retaliation claims may represent an independent cause of action separate from an underlying discrimination lawsuit. Many laws also provide for the recovery of punitive damages, which can prove quite costly to the defendant-employer. For these reasons, and the fact that retaliation claims are in some ways easier to prove than a claim for discrimination, they are a favorite of plaintiffs and their attorneys – and will be a “hot area” of employment law for some time.

The first step in preventing such lawsuits is for employers to develop and implement procedures that protect employees from discrimination. Most employers undoubtedly have such procedures in place already. If not, they should do so as soon as possible. Such policies should only be created after an employer has consulted with an attorney who can advise the employer as to the specific federal and/or state laws that govern its conduct.

### Resources

For a detailed discussion of workplace retaliation, see *Understanding & Preventing Workplace Retaliation*, published by Thompson Publishing Group. Go to [www.thompson.com](http://www.thompson.com).

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