

DON'T EVEN THINK ABOUT IT!

UNDERSTANDING AND AVOIDING RETALIATION CLAIMS

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1



2

Retaliation Statistics

- In 2010, 36% of all EEOC charges filed included allegations of retaliation.
- The percentage of EEOC charges alleging retaliation is now almost 50%.
- Retaliation claims are the *Number One* employment litigation risk to employers today.

Anti-Retaliation Statutes

- Title VII of the Civil Rights Act of 1964
- ADEA
- ADA
- Equal Pay Act
- Indiana Civil Rights Act
- Fair Labor Standards Act

Elements of Retaliation Claim

Three essential elements of a retaliation claim:

1. Employee engaged in *protected activity*.
2. Employer took *adverse action* against the employee.
3. There is a *causal connection* between the protected activity and the adverse action.

Protected Activity

Two forms of protected activity:

1. Opposition activity
2. Participation activity

Opposition Activity – Defined

- Applies if an individual explicitly or *implicitly* communicates to his or her employer a belief that its activity constitutes a form of employment discrimination.

Opposition Activity – Examples

- Threatening to file charge or other formal complaint alleging discrimination.
- Complaining to anyone about alleged discrimination against oneself or others.
- Refusing to obey order because of reasonable belief that it is discriminatory.
- Requesting an accommodation for disability.

Opposition Activity (Non-Verbal)

- Opposition activity may be non-verbal, such as picketing, engaging in a production slow-down, or refusing to engage in harassment or discrimination of another employee.

Opposition Activity (On Behalf of Another)

- A complaint on behalf of another employee, or by employee's representative, rather than by employee, constitutes protected opposition by both the person who makes the complaint and the person on behalf of whom complaint is made.

Opposition Activity

Is This Protected Opposition?

- Employee calls the President of employer's parent company to protest religious discrimination by employer.

Opposition Activity

Is This Protected Opposition?

- Employee complains to co-workers about harassment of a disabled employee by supervisor.

Opposition Activity

Is This Protected Opposition?

- Female employee complains to foreman about graffiti in workplace that is derogatory toward women.

Opposition Activity

Is This Protected Opposition?

- Employee tells her manager that if he fails to raise her salary to that of male coworker who performs the same job, she will file a lawsuit under either the federal Equal Pay Act.

Opposition Activity

Is This Protected Opposition?

- Minority employee requests wage increase. He does not state or suggest a belief that he is being subjected to wage discrimination based on his minority status.

Opposition Activity

Is This Protected Opposition?

- Employee works for employment agency. His manager instructs him not to refer any African-Americans to a particular client, based on the client's request. Employee refuses to obey the order and refers an African-American applicant to that client.

Opposition Activity (Must be Reasonable)

- Opposition activity must be reasonable.
- In applying a “reasonableness” standard, courts and EEOC balance right of individuals to oppose discrimination against employer’s need for stable and productive work environment.
- Opposition activity does not serve as license for employee to neglect job duties.

Opposition Activity (Must be Reasonable)

- Public criticism of alleged discrimination may be a reasonable form of opposition.
- Courts have protected an employee’s right to inform an employer’s customers about the employer’s alleged discrimination.

Opposition Activity (Must be Reasonable)

- Courts have found following activities were **NOT** reasonable and thus not protected:
 - Unlawful activities, such as acts or threats of violence to life or property.
 - Employee protests against allegedly discriminatory employment practices that interfere with job performance.

Opposition Activity (Good Faith Belief)

- A person is protected against retaliation for opposing perceived discrimination if he or she had a reasonable and good faith belief that the opposed practices were unlawful.
- Challenged practice need not actually be found to be unlawful!

Opposition Activity (Association Retaliation)

- Unlawful to retaliate against someone so closely related to or associated with person exercising his or her statutory rights that it would discourage that person from pursuing those rights (e.g., child, parent, relative, etc).

Participation Activity– Defined

- Unlawful to discriminate against any individual because he or she made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation.

Participation Activity (Association Retaliation)

- Unlawful to retaliate against someone so closely related to or associated with person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights.

Participation Activity (Validity of Claim)

- Unlike opposition activity, it is unlawful to retaliate against an individual for filing a claim regardless of validity or *reasonableness* of claim.
- Accordingly, claim not only can be invalid, it can also be *unreasonable*.

Participation Activity (Different Employer)

- Employee is protected against retaliation for participation in employment discrimination proceedings even if those proceedings do not involve current employer.

Adverse Actions

- **Obvious:** Denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.
- **Not so Obvious:** Threats, reprimands, negative evaluations, harassment, or other adverse treatment.

Adverse Action (Post-Employment)

- Adverse actions can occur *after* employment relationship ends.
- Examples: Unjustified negative job reference, refusing to provide job reference, and informing prospective employer about the individual's protected activity.
- **TRUTH IS A DEFENSE!**

Adverse Action (Severity of Actions)

- Some courts hold that unlawful retaliation applies only to retaliation that takes the form of ultimate employment actions (i.e., termination, demotion, suspension, etc.).
- Other courts require that retaliation only materially affects the terms, conditions, or privileges of employment.

Adverse Action (Severity of Actions)

- EEOC disagrees with courts and finds any action that is likely to deter protected activity as an adverse action.
- Examples include failure to invite to baseball game, schedule change, failure to invite to lunch, or jokes and teasing.

Causal Connection

- Must be proof that employer took adverse action because charging party engaged in protected activity.
- Proof of retaliatory motive can be through direct or circumstantial evidence.

Causal Connection (Direct Evidence)

- Examples of direct evidence:
 - Written/oral statement by company official that challenged action was taken because employee engaged in protected activity.
 - Written/oral statement by company official demonstrating bias toward employee due to protected activity.
- Direct evidence of retaliation is rare.

Causal Connection (Circumstantial Evidence)

- Circumstantial evidence is most common method of proving retaliation.
- Retaliation is established if there is circumstantial evidence raising an inference of retaliation and employer fails to produce evidence of legitimate, non-retaliatory reason for challenged action.
- Proximity in time is **KEY** piece of evidence.

Damages

- Compensatory and punitive damages.
- Retaliation frequently constitutes a practice undertaken “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Therefore, punitive damages often will be appropriate.

Preventing Retaliation Claims

- Ounce of prevention is worth pound of cure.
- Preventative measures:
 - Strong anti-discrimination/harassment policies.
 - Policies should include non-retaliation statement that encourages employees to come forward with complaints of unlawful conduct without fear of reprisal.
 - Training!

Preventing Retaliation Claims

- Adverse actions should be carefully reviewed to ensure unlawful retaliation plays no role.
- Always ask:
 - Is adverse action consistent with employer’s actual practice?
 - Is adverse action supported by documentation?
 - Is claimant being disciplined for conduct employer deemed acceptable prior to claim?
 - Would employer’s “best employee” be treated same way?

Preventing Retaliation Claims

- **EMAILS ARE HIDDEN DANGER!!**
- Performance evaluations must be accurate and consistent.

QUESTIONS?