

MANAGER TRAINING

Retaliation: Recognizing A Hidden Threat In The Workplace



The answer may surprise you, but yes, the write up could be considered retaliatory. Maria complained about perceived discrimination in the workplace and the next day, she received a written warning. The close proximity in time between Maria's complaint and the discipline gives the appearance that the employer disciplined Maria because of her complaint – making this scenario a textbook potential retaliation claim.

What is Retaliation?

Federal and most state laws protect employees and applicants from employer retaliation for engaging in “protected activity,” including filing a charge with the Equal Employment Opportunity Commission (EEOC) or a state agency; cooperating in an investigation, proceedings or litigation; or bringing a complaint to an employer. The retaliation prohibition is quite broad and includes retaliation against a person who objected to a practice that is legal but that the person reasonably believed to be illegal.

Retaliation occurs when an employer takes an “adverse action” against an employee because he engaged in a protected activity. An adverse action is an action taken by the employer to try to punish an employee for engaging in protected activity or discourage further engagement in such activities. Examples of adverse actions include:

- Employment actions such as non-selection/refusal to hire, reprimands, denial of promotion, demotion, suspension, and termination;
- Other actions affecting employment such as denial of job benefits, threats, unjustified negative evaluations, unjustified negative references, harassment, or increased surveillance; and
- Any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, “snubbing” a colleague, or negative comments that are justified by an employee's poor work performance or history.

For examples of real life retaliation situations, please login to the website —> Click on **HR Tasks** —> Click on **Harassment and Discrimination** —> click on **“Real-Life Examples of Retaliation”**.

Why Should Retaliation Claims Be “On My Radar?”

Retaliation is the most frequently alleged basis of discrimination raised before the EEOC.

Since 2000, the number of claims filed with the EEOC each year alleging unlawful retaliation has more than doubled. Retaliation is the most common type of discrimination alleged nationally, topping both race (34.7%) and gender (29.5%).

The increased frequency of retaliation claims makes them the most dangerous claims employers face. Therefore, it is important to recognize situations where retaliation claims can arise and understand how to prevent these claims from occurring in your workplace.

Step for Employers to Take to Prevent Retaliation

Preventing claims of retaliation in the workplace is surprisingly easy and does not take much effort or time. Take the following steps to help eliminate retaliation claims in your workplace:

1. **Create an Anti-Retaliation Policy.** Have a policy against retaliation in your Employee Handbook. The policy should specify what retaliation is, state that retaliation won't be tolerated and set forth a process for reporting and investigating complaints. For a model policy, see our Model Handbook. Login to the website —> Click on **HR Tasks** —> Click on **Develop Your HR Program** —> click on **Handbooks**.
2. **Provide Training to Managers and Supervisors.** Provide general training to all managers and supervisors on what types of conduct constitute retaliation and how to respond when an employee complaint is brought to their attention. In addition, when a complaint occurs, provide additional training to the managers, and supervisors who work with the complaining employee (and, where appropriate, co-workers) regarding their non-retaliation obligations. All training should be documented.
3. **Take Employee Complaints Seriously.** Take all employee complaints seriously and perform a thorough investigation. If the complaint has any basis, remedy the situation immediately. When conducting an investigation, remember to focus on the wrongdoer, not the employee who complained.
4. **Do Not Ignore or Isolate Complaining Employees.** Employees who complain of unlawful conduct should not be ignored or treated as pariahs. Instead, be proactive and engage with the complaining employee. Provide the employee with a copy of the anti-retaliation policy and tell the employee to let you know if he experiences problems. “Touch base” with the employee during and after the investigation to ensure that there have been no further incidents or other problems. Finally, document all discussions with the employee.
5. **Closely Review Subsequent Employment Actions.** An HR Professional should review subsequent employment actions affecting the employee before implementation to ensure that unlawful retaliation is playing no role in the action.
6. **Remember The Employee's Perception Is What Matters.** The employee does not have to be correct that the Company acted in an unlawful manner in order to raise a successful retaliation claim. If an employee reasonably believes that the Company (a) acted in a discriminatory manner or (b) is doing something else that is unlawful, and the employee opposes the perceived wrongful practice – **the employee is protected from retaliation** -- even if it turns out that the employee is wrong.