

Retaliation Claims

What is a Retaliation Claim?

\Re*tal' i*a'tion\, n. The act of retaliating, or of returning like for like; retribution; now, specifically, the return of evil for evil; e.g., an eye for an eye, a tooth for a tooth.

Syn: Requit; reprisal; retribution; punishment.

Webster's Revised Unabridged Dictionary, ©1996, 1998 MICRA, Inc.

Numerous federal and state statutes and common law causes of action prohibit employers from retaliating against, or punishing, any employee who participates in protected activity. Thus, any "negative" conduct toward the employee who made the first report or complaint, OR any other employee who participated in the investigation can be fodder for a complaint of retaliation, could lead to a lawsuit, and may result in judgment against the employer. Damages can typically include not only actual economic damages but "compensatory damages" including mental anguish and punitive damages.

Who is Protected? Any employee who:

- complains of discrimination on the basis of race, color, religion, sex or national origin or testifies, assists or participates in any manner in an investigation, proceeding or hearing relating to a complaint of discrimination on the basis of race, color, religion, sex or national origin (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, 42 U.S.C. §2000e-3(a));
- complains of discrimination on the basis of disability or opposes disability discrimination or testifies, assists or participates in any manner in an investigation, proceeding or hearing regarding a claim of disability discrimination (Americans With Disabilities Act, 42 U.S.C. § 12203 (a));
- complains of age discrimination or testifies, assists or participates in any manner in an investigation, proceeding or hearing relating to a complaint of age discrimination (Age Discrimination in Employment Act, 29 U.S.C. § 623 (d));
- asserts a right to take family or medical leave under the Family Medical Leave Act (29 U.S.C. § 2615 (a) (1); 29 U.S.C. § 2615 (a) (2); 29 U.S.C. § 2615 (b));
- files a complaint under the Fair Labor Standards Act, complaining of, for example, failure to pay overtime or failure to pay minimum wage (29 U.S.C. § 215 (a) (3));
- complains about or assists others in complaining about OSHA violations (29 U.S.C. §660 [c]);
- seeks to organize other employees to be represented by a labor union, or files a complaint or gives testimony in a claim under the National Labor Relations Act or the Railway Labor Act (29 U.S.C. §158(a); 45 U.S.C. § 152 Fourth and Tenth);
- seeks benefits under an employee benefit plan, or files a claim under such plan (ERISA, 29 U.S.C. § 1140);
- engages in any lawful act taken to provide information, cause information to be provided (either within the corporation or to an appropriate outside official), or otherwise assists in an investigation, regarding conduct which the employee "reasonably believes" constitutes a violation of criminal provisions noted in the statute, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders (Sarbanes-Oxley Act, 18 U.S.C. §1514A); or
- complains about conduct prohibited by state law, or seeks benefits protected by state law (see below).

You should note that it is not only the employee who raises or files a complaint who is protected, but ***any employee who participates*** in the investigation or resolution is also protected against retaliation.

Note also that although this list covers at least most of the federal retaliation laws, it is not an exclusive list. Many states have statutes or common law causes of action that make other activities "protected." For example, in addition to its statute that prohibits retaliation for complaining about unlawful discrimination or harassment, a Texas statute prohibits retaliation for filing a workers' compensation claim and Texas common law prohibits retaliation in the form of termination of an at-will employee for the sole reason that the employee refused to perform an illegal act.

What Constitutes Retaliation?

In order for conduct to constitute retaliation, it must result in at least some harm to the protected employee, however slight. Not surprisingly, different courts have different standards of "harm" to which the conduct must rise to constitute retaliation sufficient to support a lawsuit.

Courts have held the following employment actions and workplace conduct sufficiently harmful to the protected employee to allow that employee to pursue a retaliation lawsuit:

- failure to promote;
- refusal to consider paying additional severance pay after the employee's position was eliminated;
- demotion with no decrease in pay;
- suspension without pay, even though the lost pay was subsequently reimbursed (loss of use of the funds for the time they were unpaid);
- lateral transfer to a different position with different duties;
- co-worker harassment including manure in employee's parking space, hair in her food, a rubber band shot at her, and scratches on her car where the employer did nothing to address the harassment;
- undeserved performance ratings;
- an unfavorable job reference (note that former employees can raise claims of retaliation for protected activity.);
- supervisors calling employee a "liar," a "rabble-rouser," and a "troublemaker";
- ostracism by co-workers including refusal to work with employee, approved and acquiesced in by employer.

One form of treatment that can lead to a retaliation charge is selective enforcement of rules. I am aware of more than one occasion in which supervisors, after learning of an employee participating in protected activity, adopt an attitude that can best be characterized as, "So you want to live by the rules--we'll live by the rules." A workplace that has been somewhat loose or lenient in making its employees abide by the policies and procedures of their employer is suddenly transformed to a workplace in which rules are rigidly enforced--often with regard to only the employee who filed a complaint or participated in other protected activity. That rigid rule enforcement could, in turn, lead to lower performance ratings or other negative result for the employee who engaged in protected activity. BEWARE! Just because an employer has rules--even written rules--does not mean that supervisors can selectively enforce the rules without drawing a charge of retaliation.

Does Participation in a Protected Activity Make an Employee Immune from Any Personnel Action Forever?

Participation in a protected activity does not make an employee "untouchable," or ensure that they can never receive legitimate corrective action from an employer. In order for an employee to support a claim of retaliation, evidence must exist to demonstrate a causal connection between his/her participation in the protected activity and the adverse employment action. However, the type of causal connection that the employee must establish is not a particularly high standard. Although the standard may vary some from court to court, most courts have held that it is not necessary for a plaintiff to prove that his/her participation in the protected activity was the "sole motivating factor" that resulted in the adverse employment action. If the adverse employment action was based in part on the protected activity, or even a demonstration that the protected activity and the adverse employment action "were not wholly unrelated" may suffice to allow for trial of lawsuit alleging retaliation.

Of course, as in a discrimination claim, evidence that the employee was treated differently than other employees, evidence that the adverse employment action was taken in contravention of the organization's policy, or evidence that the employer's reasons for the adverse employment action were false can all support a retaliation lawsuit. However, even "close timing" between the adverse employment action and an employee's participation in protected activity may be sufficient to support a retaliation claim, "Close timing" does not have to be a matter of days--courts have held that an adverse employment action taken two years after the employee engaged in protected activity was sufficient to support a retaliation lawsuit.

What if the Protected Activity Had No Merit or was Untrue?

Employees are protected from retaliation for engaging in protected activity even if it is ultimately decided that their underlying claim had no merit. For example, if a plaintiff in a lawsuit alleges sexual harassment and retaliation for making the claim of sexual harassment, it is quite possible for the jury to decide that although the plaintiff was not sexually harassed, she was retaliated against for making the claim, and thus award actual, compensatory and punitive damages. In fact, some courts have decided that in the context of an employee engaging in protected activity, **even false and malicious statements by the employee**, in certain circumstances, cannot provide the basis for termination without giving rise to a claim of retaliation.

What's an Employer to Do?

Employers, human resources professionals, managers and supervisors do well to be aware that regardless of whether an employee's claim of harassment or discrimination (or other protected activity) is found to have merit, any negative conduct or adverse employment decision related to that employee could result in a finding of unlawful retaliation and an award of damages. Although there is no guaranteed way to completely avoid a retaliation allegation, here are some **"best practices" to help avoid retaliation liability:**

- Ensure policies are adhered to uniformly before a complaint of illegal behavior occurs. The employer will then have some recourse to discipline a complaining party when appropriate.
- Keep all claims by employees and resulting investigations as confidential as possible. Share information about the claim only on a "need to know" basis. If a decision maker can truthfully testify that he/she never knew about the protected activity, it is extremely difficult for the affected employee to prove a causal connection.
- When an investigation or charge is closed, remain vigilant. Alert managers and supervisors who know of the protected activity of the risk of a retaliation claim.
- Take prompt investigatory (and remedial if appropriate) action if you believe that any adverse treatment or employment decision may be motivated in any way by an employee's participation in protected activity.
- If a tough call arises, such as where it appears the conduct of an employee who has engaged in protected activity legitimately warrants corrective action or termination, consult with upper level human resources professionals and legal counsel prior to implementing the action. Know the risk associated with each option.

By remaining alert, knowledgeable and vigilant, you may prevent the unpleasant circumstance of being sued for retaliation just when you thought it was safe to relax and get back to operating the business.

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