

RETALIATION IS ON THE RISE: ADDRESS THE ISSUE BEFORE IT'S TOO LATE

*Exacting revenge works well in Hollywood. Take for example, the hit television series aptly titled *Revenge*, where a woman moves back to her childhood hometown to “get back” at those individuals who wronged her family and changed the course of her life. What may be captivating in fictional stories does not play out the same way in real life. This is particularly true in the workplace, where retaliating against an employee for exercising his or her rights exposes the business enterprise to serious legal claims that can significantly impact the bottom line.¹*

The desire to get even can be a very natural response. Often, when people are offended or accused of wrongdoing, they respond emotionally. They want to get back at the offender, “save face” in front of co-workers and management, and protect their own jobs. “Retaliation is a coping mechanism — a way of alleviating the psychological discomfort associated with perceived injustice.”² We all know that “getting even” is not the best course of action in any situation, but this is undeniably so in the workplace where it is actually illegal.

Both federal and state laws protect employees from unlawful employment discrimination. Those same laws also insulate employees from being retaliated against for exercising those rights— even if their underlying claims of discrimination have no merit. Retaliation is its own protected category and can stand on its own. In fact, it is often easier to establish retaliation than the underlying claim of discrimination.



➤ RETALIATION CLAIMS ARE BECOMING MORE AND MORE COMMON

For fiscal year 2015, 44.5% of claims filed with the EEOC alleged retaliation — the highest percentage ever recorded for this category — far surpassing race-based claims which came in second at 35%. The number of retaliation claims has been steadily increasing over the last ten years and shows no sign of slowing down, even though the total number of employment discrimination complaints received by the EEOC has decreased in the last three years.³

Retaliation in the workplace is a key priority for EEOC Chairwoman Jenny Yang.⁴ In June 2015, the EEOC held a forum on retaliation to hear from constituents on all sides of the issue and the EEOC strongly advocates training employees, especially supervisors, about how to prevent and correct for retaliatory conduct.⁵ The EEOC has specifically declared that condoning or turning a blind eye to retaliation has a “chilling effect upon the willingness of individuals to speak out against employment discrimination or to

participate in the EEOC's administrative process or other employment discrimination proceedings.”⁶ Failing to address the potential for retaliation also creates an environment that could allow discriminatory behaviors to go unchecked, exposes businesses to increased liability – and negatively impacting morale.

➤ IF OVERALL COMPLAINTS ARE DECLINING, WHY THE RISE IN RETALIATION CLAIMS?

The increase in retaliation claims can be attributed to a variety of factors.

First, employees are just better informed about the many protections afforded to them under various federal and state laws. Employment discrimination and harassment lawsuits and high profile settlements receive expanded attention in the national news; to research an issue, the internet is only as far away as your smartphone; and social media spreads information faster than anyone ever thought possible a decade ago.

Retaliation claims are particularly attractive because succeeding on a retaliation claim does not require any proof of discriminatory conduct. In fact, just making an employment discrimination complaint cloaks the employee in a protected status to which they would not otherwise be entitled. Anyone can claim to be a “victim” of retaliation and employees can create their own protected status simply by lodging a complaint. To make matters worse for employers, recent court decisions have made it easier to succeed on retaliation claims by expanding the concept of what qualifies as retaliation and who can be subject to it.⁷



Plaintiffs and their attorneys like to assert retaliation claims because juries often can relate better to a retaliation charge than a claim of discrimination. Even if a jury does not believe that discriminatory or harassing conduct occurred, it can still accept the idea that an employer and/or a manager was so unhappy with the accusation that they reacted negatively toward the plaintiff as a result.

➤ HOW DO YOU ESTABLISH A RETALIATION CLAIM?

Unlawful retaliation takes place when an adverse employment action is taken against a covered individual because that individual engaged in a protected activity.

PROTECTED ACTIVITY

A retaliation claim starts with an employee engaging in legally defined protected activity. This can include a variety of conduct, including:

- **Opposing practices believed to be unlawful, such as:**
 - Complaining internally about discriminatory behavior or practices;
 - Threatening to or actually filing a complaint with the EEOC, similar state agency or in court;
 - Picketing in opposition to discriminatory practices;
 - Refusing to follow directives that are believed to be unlawful

- **Participating in an employment discrimination investigation or proceeding, such as:**
 - Filing a discrimination complaint;
 - Cooperating in an internal investigation;
 - Serving as a witness in a discrimination investigation, proceeding, or litigation
- **Various other activities also can qualify as protected activity, including:**
 - Requests under the Family Medical Leave Act or similar state law leave;
 - Requests for reasonable accommodation, including leave, for religious or disability reasons;
 - Workers' compensation leaves

➤ ADVERSE EMPLOYMENT ACTION

An **"Adverse Employment Action"** is any action taken with the purpose of discouraging an individual from engaging in protective activities and is not limited to the obvious actions of termination, demotion, or threats of such moves. The U.S. Supreme Court has defined adverse employment actions to include employer conduct that ***"well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"***⁸

- **Courts and the EEOC have found the following actions to qualify as an Adverse Employment Action under certain circumstances:**
 - Termination
 - Refusal to hire or rehire
 - Denial of promotion or other opportunities
 - Transfer to a less desirable or prestigious position or assignment
 - Unjustified negative evaluations
 - Unjustified negative references
 - Lost opportunities to earn overtime
 - Denial of the use of a government vehicle
 - Assault
- **While courts and the EEOC recognize that petty slights or snubs⁹ do not rise to the level of retaliation, adverse employment actions can manifest in subtle ways:**
 - Supervisors ignoring the employee and/or refusing to interact with him/her¹⁰
 - Workplace sabotage¹¹
 - Relocation of the employee's desk and exclusion from meetings¹²
 - Punitive scheduling¹³
 - Burdensome increase in workload¹⁴
 - Increased monitoring or micromanaging¹⁵
 - Prolonged campaign of staring¹⁶
 - Pattern of conduct consistent with retaliation¹⁷
 - Assertion of counterclaims in response to an employee's complaint¹⁸

- Shunning or ostracism condoned or facilitated by the employer such as granting employee requests not to work with the complaining employee.¹⁹

➤ COVERED INDIVIDUALS

Covered individuals are those employees who exercise their rights under the applicable federal or state anti-discrimination law, whether by participating in the process or raising objection to perceived unlawful conduct.²⁰ Recently, the U.S. Supreme Court expanded the scope of who is a “covered individual” by holding that individuals closely associated with someone engaged in protected activity, i.e., in the “zone of interest,” is also a covered individual. So, in other words, it is now unlawful for an employer to terminate an employee’s spouse or fiancé because the employee filed an internal discrimination complaint. Notably, the Court did not limit the “zone of interest” to family members. It left the parameters of that definition open for lower courts to decide.²¹

➤ TRAINING AND COMMUNICATION ARE YOUR BEST WEAPONS AGAINST RETALIATION



As with the underlying discrimination claims, employers must take all reasonable steps to prevent and correct for retaliation in the workplace. While it is likely that you already have such mechanisms in place to combat discrimination, many employers have failed to expand those mechanisms to adequately combat retaliation.

To start, employers need to have:

- Effective, up-to-date policies and procedures addressing retaliation that are communicated periodically to all employees.
- Anti-retaliation Training for supervisors, and better yet, all employees.
- Complaint mechanisms that trigger prompt and thorough investigations of all potential retaliation claims and scenarios.

While all of this is crucial, it is also not enough. The reality is that those supervisors and co-workers affected by a discrimination or harassment complaint – or whose department is short-staffed because a co-worker is on an extended FMLA leave – may be experiencing very strong emotions about the situation. They may be angry, frustrated, or embarrassed, depending on the situation, and the work environment may be uncomfortable or very tense. This is particularly true if the allegations lodged are believed to be false or questionable.

Here is where the training of your workforce will be critical. First and foremost, employees must be educated about preventing discrimination and retaliation. Effective training should focus on raising awareness of the behaviors that constitute discrimination and retaliation, as well as the legal and professional risks of both types of claims. Training also should address the value proposition for diversity, tolerance, and inclusion. **A culture of respect and transparency will improve the company’s bottom line and, in turn, the individual employees’ success and experience.**

But training cannot stop at prevention because claims inevitably will be filed. Managers and employees need to know what to do

once that happens. **The best piece of advice is to proceed with business as usual.** The complaining employee must not receive any “special” treatment, positively or negatively, as a result of taking part in protected activities. If any employment action is necessary once an employee makes a complaint or engages in some protected activity, managers must be meticulous about documenting all decisions and ensure that all decisions are backed up by legitimate, non-retaliatory reasons. **As with all human resources issues, consistency is key.**

The accused individuals must be counseled not to take the allegations personally; as hard as that may be, they must rise above it. They must step back from the situation and keep some perspective because what might seem like a minor change in the work environment could be grounds for a retaliation claim.

The EEOC outlines the following steps that managers should take when faced with a discrimination complaint:²²

- Avoid publicly discussing the allegation;
- Do not share information about the EEO activity with any other managers or subordinates;
- Be mindful not to isolate the employee
- Avoid reactive behavior such as denying the employee information/equipment/benefits provided to others performing similar duties
- Do not interfere with the EEO process;
- Provide clear and accurate information to the EEO staff, EEO Investigator, or Judge
- Do not threaten the employee, witnesses or anyone else involved in the processing of a complaint.

These suggestions are a good starting point, and an effective training program will cover these and other tips that will assist managers (and all employees) when confronted with these types of situations. Training is critical to heading off issues before they arise.

¹ *Commissioners Examine Strategies to Reduce Retaliation in the Workplace — Workplace Culture Key to Preventing and Rectifying Retaliation*, U.S. Equal Employment Opportunity Commission (June 17, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/6-17-15.cfm>. Remedies for retaliation claims include compensatory damages, back pay and shifting attorneys’ fees.

² *Univ. of Tex. Southwestern Medical Center v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517 (2013)

³ See Enforcement and Litigation Statistics, U.S. Equal Employment Opportunity Commission. <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>

⁴ Dana Wilkie, Yang: *Pregnancy Discrimination and Workplace Retaliation Remain Problems — EEOC’s First Asian-American Chair Discusses Priorities*, Society for Human Resources (Sept. 8, 2014), <http://www.shrm.org/hrdisciplines/Diversity/Articles/pages/yang-eeoc-chairwoman.aspx>

⁵ *Commissioners Examine Strategies to Reduce Retaliation in the Workplace — Workplace Culture Key to Preventing and Rectifying Retaliation*, supra.

⁶ *Retaliation — Making it Personal*, U.S. Equal Employment Opportunity Commission. http://www.eeoc.gov/laws/types/retaliation_considerations.cfm.

⁷ It should be noted that although the U.S. Supreme Court has lowered the hurdle for plaintiffs in certain aspects of proving their retaliation cases, these cases are not always slam dunks. In one employer-friendly decision, the Court determined that to prove retaliation, plaintiffs must establish that the employer would not have taken the complained of action but-for a plan to seek revenge on plaintiff for engaging in protected activity such as filing a complaint. *Nassar*, 133 S. Ct. 2517.

⁸ *Burlington Northern & Santa Fe Railway, v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006)

⁹ *Slaughter v. College of the Mainland*, 2014 WL 1917981 (S.D. Tex. May 13, 2014). But cf., *Johnson v. Weld County*, 2008 WL 4402247 (D. Colo., Sept. 24, 2008) (finding that the “silent treatment” does not constitute actionable retaliation).

¹⁰ *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090 (9th Cir. 2008); *McSparran v. Commonwealth of Pa.*, 2014 WL 1371594 (M.D. Pa. April 8, 2014).

¹¹ *Hicks v. Baines*, 593 F.3d 159, 170 (2d Cir. 2010).

¹² *Slaughter*, supra.

¹³ *Hicks*, 593 F.3d at 170.

¹⁴ *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010); *White v. City of Middletown*, 45 F. Supp. 3d 195, 204-05 (D. Conn. 2014).

¹⁵ *White*, 45 F. Supp. 3d at 204-05.

¹⁶ *Birschtein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994, 1002 (2001).

¹⁷ *Rother v. NYS Dept. of Corrections & Community Supervision*, 970 F. Supp. 2d 78 (N.D.N.Y. 2013); *Wysinger v. Auto. Club of Southern Cal.*, 157 Cal. App. 4th 413 (2007).

¹⁸ *Rosania v Taco Bell of Amer. Inc.* 303 F. Supp. 2d 878, 883-89 (N.D. Ohio 2004).

¹⁹ *E.E.O.C. v Wyeth*, 302 F. Supp. 2d 1041, 1070-71 (N.D. Iowa 2004).

²⁰ Employees who bring attention to unlawful activity outside the employment law arena, so called “whistleblowers”, are protected from retaliation under other federal and state laws as well. See, e.g., The False Claims Act, 31 U.S.C. §3730(b); Sarbanes-Oxley Act, 18 U.S.C. §1514(A); Dodd-Frank Act, 15 U.S.C. § 78u-6; Conscientious Employee Protection Act, N.J. Stat. § 34:19-1 (2007).

²¹ *Thompson v. North American Stainless, LP*, 562 U.S. 170, 173-78, 131 S. Ct. 863, 867-70 (2011).

²² *Retaliation — Making it Personal*, *supra*.