



Employee retaliation policies protect current and former employees, uphold businesses' integrity

DON'T GET MAD, don't get even: avoiding workplace retaliation claims

BY BONNIE A. WENDORFF, J.D.



All employers should understand the legal principles of retaliation in order to avoid the common missteps that lead to retaliation claims.

Most employers know the law prohibits retaliation against employees who file discrimination charges. But many employers do not know the law also

protects employees who merely complain about discrimination or testify in a discrimination lawsuit. In addition to discrimination laws, almost all employment laws contain anti-retaliation provisions. Some of these include wage and hour laws, the Family and Medical Leave Act, Employee Retirement Income Security Act, the Occupational Safety and Health Act, Sarbanes-Oxley, worker's compensation laws, labor laws, and veterans' protection laws such as the Uniformed Services Employment and Reemployment Rights Act.

Retaliation is one of the fastest-growing categories of employment litigation. Here's why: Retaliation claims are independent from any underlying claim. An employee could lose the underlying claim, but win a retaliation lawsuit. Retaliation claims are relatively easy to prove. And, let's face it, retaliation happens. When faced with accusations of wrongdoing, it can be a natural human instinct to want to "get even."

But in this context, getting even can be very costly. All employers should understand the legal principles of

retaliation in order to avoid the common missteps that lead to retaliation claims.

The basic elements of a workplace retaliation claim are: (1) the employee engaged in legally "protected activity"; (2) the employee suffered an "adverse action"; and (3) there is a "causal link" between the protected activity and the adverse action.

Protected activity is either "oppositional" or "participational." Oppositional activity can be either formal, such as filing a complaint with an agency, or informal, such as complaining to a supervisor about discriminatory treatment. Naturally, the employee must have a good faith belief that the challenged conduct actually violates the law. In addition, the employer must understand that the employee is opposing unlawful conduct, and is not just grousing.

Participational activity occurs where the employee files a formal complaint, testifies, assists, or participates in an investigation or legal proceeding related to alleged illegal conduct. This protection applies to complaining parties and others who may be asked to provide information or testimony.

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Under Wisconsin law, participational activity carries absolute protection, which means the employee need not show good faith. However, mere participation in a lawsuit would not shield an employee from the consequences of his or her underlying actions. Thus, a person accused of harassment may be protected because he or she is required to give a deposition, but he or she is not protected from discipline relating to the harassment itself.

Both current and former employees are protected against retaliation. If a former employee files a complaint, a negative employment reference could be retaliation. In addition, Wisconsin employees are protected from retaliation based on the employer's belief that the person has engaged in, or may engage in, protected activity. Thus, an employee generally may not be punished merely because the employer thinks the employee has filed or may file a claim.

Retaliation also requires "adverse action." Traditionally, adverse action meant termination, failure to promote, reassignment with different responsibilities, a substantial change in pay or benefits, or harassment that created a hostile environment. Petty slights and inconveniences, such as minor shift changes or ostracism by a supervisor, normally would not qualify. Last summer, however, the U.S. Supreme Court

lowered the standard for what might constitute adverse action. Under the new standard, the action must only "dissuade a reasonable worker from making or supporting a charge of discrimination." An example might be a slight change in shift that negatively affected a particular plaintiff because of her unusual child care responsibilities.

The final element of retaliation is "causation." This means the adverse action was caused by the employee's protected activity. Proving causation is easy. For example, the employee need only show that the justification given by the employer is false, the employee has shifted its explanations, or there is close proximity in time between the protected activity and the adverse action.

All is not lost, however. An employer can defeat a retaliation claim by showing it was not aware of the protected activity, it had legitimate, nonretaliatory reasons for its actions, or it had raised issues with the employee prior to the employee's engaging in protected activity.



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Here are some additional, proactive steps that an employer may take to prevent retaliation claims:

- Carefully document all employment decisions.
- Review each adverse personnel decision to be sure it is justified and consistent with policies and past decisions.
- Do not merely rely on supervisors' recommendations.
- Take corrective actions before the employee complains about unfair treatment.
- Make sure employment policies prohibit retaliation.
- Train supervisors properly as to what employee activity is protected, how to properly address claims, the liability risks for retaliation, and the need to refrain from petty vindictiveness.
- Be sure that employees do not give employment references without first consulting with human resources.
- Treat all employee complaints seriously.
- After protected activity has occurred, monitor to see that no retaliation occurs.
- Consult with legal counsel to prevent problems before they occur.

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