



Labor and Employment Law Seminar

**2026
LAS VEGAS**

HR AND LITIGATION RISK: DON'T RETALIATE. DON'T CAPITULATE: HOW TO MANAGE, DISCIPLINE, AND TERMINATE EMPLOYEES WHO COMPLAIN



Presented by

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**HR AND LITIGATION RISK:
DON'T RETALIATE.
DON'T CAPITULATE:
HOW TO MANAGE, DISCIPLINE,
AND TERMINATE EMPLOYEES
WHO COMPLAIN**

Elements Of A Retaliation Claim

1. Employee engages in a protected activity.
2. The employee experiences an adverse employment action.
3. There is a connection between the two.

**WHY RETALIATION
CLAIMS ARE SO
DANGEROUS**

You Can Beat the Discrimination Claim and Still Lose on Retaliation.

- An employee alleges race discrimination
- The employer proves there was none
- The employer still loses, because of how management treated the employee after the complaint

**What happens AFTER the complaint can be more dangerous
than what happened BEFORE it.**

Wrong About Discrimination. Still Protected From Retaliation.

- Employee complains about two inappropriate sexual comments
- Those comments may not make a hostile work environment
- The employee may still reasonably and in good faith believe unlawful harassment occurred

An unsuccessful complaint is not necessarily an unprotected complaint.

The Hardest Time Not to Retaliate Is When You Really Want To.

- Some complaints are exaggerated, misguided, or timed to dodge discipline
- Management gets frustrated; supervisors get defensive
- That is when retaliation risk climbs

You don't have to agree with the complaint.

You do have to control your response.

**DON'T LET THE
COMPLAINT
PARALYZE
MANAGEMENT**



Protected Activity Does Not Mean Protected Employment.

Employees who complain must still perform, follow policies, meet legitimate expectations, and accept appropriate discipline.

The law protects employees from retaliation, not accountability.

Don't Let the Complaint Become a Documentation Black Hole.

- Employee complains; supervisor gets nervous
- Performance counseling stops
- Six months later, management wants to terminate and the documentation is gone

Keep managing. Keep documenting. Keep applying the same standards.

Continue ordinary documentation; never intensify scrutiny or manufacture a paper trail.

Death by a Thousand Paper Cuts.

- Exclusion from important meetings
- Unusual micromanagement
- Denial of training
- Withdrawal of resources or staff
- Undesirable assignments
- Professional isolation

Small management decisions can create big retaliation problems.

Don't Let the Accused Supervisor Be Judge, Jury, and Executioner.

Employee complains about a supervisor.

Two weeks later, that supervisor recommends termination.

- Require HR approval for termination
- Independent review of significant adverse actions
- Independently verify the supervisor's facts
- Higher risk? Get counsel's review first

Independent review is a safeguard, not a rubber stamp.

Limit the Circle of Knowledge.

Not every manager needs to know about every complaint.

Unnecessary disclosure gives protected activity more chances to influence decisions.

Need to know. Not nice to know.

**TIMING,
TERMINATIONS,
AND TOUGH CALLS**

Monday: Complaint.

Friday: Termination.

- Close timing invites scrutiny
- More protected activity may follow:
complaints, charges, lawsuits



COMPLAINT



DISCIPLINARY EVENT



AGENCY CHARGE



LAWSUIT

Monday: Harassment Complaint.

Wednesday: Punches a Customer.

Thursday: Fired.

Would you fire this employee?

Does Monday's complaint force you to keep them?

No. Investigate. Preserve evidence. Check consistency.

Document the legitimate basis.

Bad timing doesn't excuse bad behavior.

Sometimes a Legitimate Opportunity to Terminate Is Just That.

A marginal employee complains, then commits a serious, independently verifiable policy violation.
Pass it up solely because of the complaint?

1. Would we terminate someone who hadn't complained?
2. Have we treated similar misconduct consistently?
3. Can we prove the legitimate reason?

Don't invent a reason. Don't ignore a legitimate one.

Sometimes Giving One More Chance Creates the Next Lawsuit.

Overlook problems. Grant repeated exceptions. Postpone hard decisions.

Later, explain why tolerated conduct suddenly justified termination.

Fairness doesn't require paralysis.

It requires consistency.

If the Decision Predates the Complaint, Prove It.

Management decides to terminate; before it's communicated, the employee complains.

Can you show when the decision was actually made?

- Preserve emails and notes predating the complaint
- Identify who decided, and when
- Separate final decisions from preliminary talk
- Check whether new information requires reconsideration
- Never backdate or manufacture documentation

**Evidence created before the complaint
beats explanations reconstructed six months later.**

Two Trains, Two Tracks.



“Before You Fire Me, I Need to Tell You Something...”

Two trains, two tracks.

- Termination: legitimate, supported, consistent, already final?
- New complaint: investigation or corrective action needed?

Pause. Consult HR or counsel. Proceed, defer, or reconsider.

Two issues. Two analyses. Potentially two different outcomes.

What If FMLA Leave Is The Protected Activity?

What About RIFs?



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Questions?



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Thank you.