



# Retaliation Claims Continue to Rise, Lead the Pack at the EEOC

Insights

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From 1997 to 2008, race discrimination was the most frequently asserted claim by individuals filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC). Since 1997, race discrimination has been asserted in approximately 35% of all EEOC charges.

In 2009, a new leader emerged among claims as retaliation became the most frequently asserted claim by individuals in EEOC charges. In fact, 36% of all charges filed with the EEOC in 2009 included a claim of retaliation. The number represents an approximately 70% increase in retaliation claims over the last decade and underscores the German proverb, "[r]evenge converts a little right into a great wrong."

## The Rules Regarding Retaliation

Federal laws, as well as many states' laws, prohibit employers from taking an adverse action against an employee because the employee opposed an unlawful employment practice or policy, or otherwise engaged in protected activity. Generally, to assert a retaliation claim individuals must show three things: 1) they engaged in protected activity, such as testifying regarding discrimination or opposing an unlawful activity; 2) there was an adverse employment action (e.g. termination or denial of a raise); and 3) there is a connection between the protected activity and the adverse action.

In 2006, the U.S. Supreme Court lowered the standard that individuals must meet to win a retaliation claim under federal anti-discrimination laws. In particular, the Court determined that to assert a retaliation claim, an employee need only show that the employer took an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Additionally, the standard for proving a causal connection is not high. For example, suspicious timing between the protected activity and the adverse employment action may be sufficient to allow employees their day in court.

## The Reason for Rising Retaliation Claims

Retaliation claims are increasingly asserted both in charges of discrimination and in lawsuits. Why? It's not attributable to an increase in vindictive, ruthless managers, but rather due to three factors. The first, is the change in the standard required to prove a retaliation claim under federal anti-discrimination legislation. The second, is an increased understanding by employees (and their attorneys) of the law regarding retaliation. The third, is human nature. Jurors often believe that it is

understandable, even expected, for a manager or an employer to react or "strike back" at individuals who accused them of wrongdoing.

It's easier for a juror to believe that a manager or supervisor changed his or her behavior towards a "squeal," than it is for a juror to believe the same manager or supervisor discriminated against the same employee. As a result, an employee can often succeed on a retaliation claim even if the underlying complaint lacks merit.

### **The Price of Revenge**

The surge in retaliation claims has yielded claims that are tougher to defend and more expensive to resolve. A review of recent retaliation claims asserted against healthcare employers shows that retaliation claims can take a variety of forms. For example, in February, 2009, a Boston neurosurgeon was awarded \$1.6 million in damages by a federal jury that found her employer and department chairman retaliated against her for complaining about discrimination, and violated a Massachusetts healthcare whistleblower law. As part of her claim, the neurosurgeon alleged that after she complained about discrimination, her employer retaliated by directing her to undergo a medical evaluation as a condition for renewing her credentials. The attorney for the neurosurgeon was able to obtain an order preventing the hospital from requiring the examination.

A Tennessee state court ruled in December, 2009, that a nurse had raised sufficient issues of disputed fact to allow her claim of retaliation to proceed to trial. The nurse alleged that she was subjected to harassment and the "cold shoulder treatment" after she expressed concern that a hospital policy which required nurses to dispense medication from a "mini-pharmacy" when a pharmacist was not on-duty forced the nurses to act outside the scope of their licenses. The hospital and nurse eventually agreed that the practice did not violate licensing requirements, but the court found that the nurse nonetheless had produced sufficient evidence that her employer violated her First Amendment rights by retaliating against her after she questioned the employer's policy.

Finally, a federal court in Ohio ruled in February, 2010, that a hospital director raised sufficient evidence of unlawful discrimination and retaliation under the federal Americans with Disabilities Act and state civil rights laws. The director, who had been diagnosed with bipolar disorder, alleged that her medical condition made it difficult for her to concentrate and block out stimuli in her environment. To help her focus, the director worked with her door closed and, on occasions, worked a flexible schedule from home. For a period of eight years the director received satisfactory performance evaluations.

After a new supervisor took over leadership of the director's department, the supervisor refused to allow the director to work from home and denied her request for flexible hours. The court determined that the employee raised sufficient evidence of retaliation for making the request to allow her case to be tried in front of a jury.

### **Preventing Retaliation Claims**

Despite the rise in retaliation claims, there are several steps you can take to prevent retaliation claims, and better defend your company against claims:

### *Develop a Policy*

The first step is adopting an anti-retaliation policy. The policy should state that retaliation is unlawful and violations could lead to disciplinary action, up to and including termination. Additionally, the policy should require employees to report claims of retaliation and establish a reporting structure similar to that used for discrimination or harassment complaints.

### *Conduct Training*

The second step is conducting training. Supervisors and managers that understand the consequences of retaliation are more likely to self-regulate their behavior and be cognizant of how their response to a complaint could lead to a retaliation claim. And training should not be limited to supervisors and managers. Employees should be trained not only on the existence of the policy, but also the procedure for reporting a claim.

### *Investigate Complaints*

An employee who files a complaint should be assured both by your policies and your actions that complaints are taken seriously and are investigated thoroughly. Document an employee's complaint, conduct a full investigation, and keep a record of the findings of the investigation. Conducting and documenting a comprehensive investigation will provide support for your contention that you took the employee's allegations seriously and handled them with care.

Regardless of the outcome of the investigation, advise the employee orally and in writing that retaliation is prohibited under company policy and any retaliatory behavior should be reported immediately.

### *Maintain Confidentiality*

During and after an investigation into a complaint, keep an employee's complaint confidential.

Disclosure of the complaint to other employees, including supervisors and managers, should be limited to a "need-to-know" basis.

Failure to maintain confidentiality can support an employee's contention that the company did not take the complaint seriously. Additionally, ignorance is one of the best defenses to a retaliation claim. In particular, an employer can defeat a claim of causation between protected activity and an adverse action by demonstrating that the supervisor or manager who took the adverse action lacked any knowledge of the complaint.

## *Be Mindful of Perceptions*

An individual who engages in protected activity is not insulated from disciplinary action.

Rather, an employer has a right to require a complaining employee to meet its expectations, abide by the company's standard of conduct, and follow company policy. But remember that an adverse action that follows closely on the heels of a complaint or report by an employee could be perceived by the complaining employee, or other employees, as retaliatory due to the temporal proximity alone. Carefully evaluate not only the period of time between a complaint and proposed adverse action, but also the basis for the adverse action, to ensure there is no connection between the two.

If discipline or counseling is warranted, be certain that performance deficiencies or the misconduct is documented and any action taken against a complaining employee is consistent with treatment of other employees.