



# You Are Going To Face A Retaliation Claim — Deal With It

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Numbers do not lie. It has become a standard part of anyone's labor and employment law practice: take a discrimination complaint — whether it is before an agency or a court — and more often than not a retaliation claim is also involved in the mix. Typical example: "I complained, but was ignored. Then, they fired me." Case law tells us a retaliation claim can be asserted, even if there is no validity to the underlying discrimination complaint.

## Why The Number Of Retaliation Claims Keep Going Up

There are a number of interrelated reasons why the U.S. Equal Employment Opportunity Commission, other agencies and courts are seeing a steady increase in retaliation claims. First, employees are being asked to report problems they witness or experience in the workplace. Whether it is pursuant to an open door policy, an ethics or compliance hotline or a reporting mechanism for sexual harassment or discrimination complaints, we are effectively encouraging employees to become whistleblowers.

For example, the Ellerth and Faragher cases established a commonly known defense against harassment claims under Title VII, the Faragher- Ellerth defense. This defense is available to employers if they exercised reasonable care to prevent and promptly correct any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

As a result, this defense incentivizes employers to develop strong compliance programs as an affirmative defense to hostile work environment cases. It is not a coincidence that we have seen more retaliation cases since Ellerth and Faragher were decided and more employers adopted proactive policies. The more we encourage employees to report alleged misconduct and file complaints, the more inevitable it becomes that there will be an increase in the number of people who use that mechanism. Those users are entitled to protection from retribution.

Second, there are a growing number of statutes that protect whistleblowers from retaliation. The thinking goes something like this: laws are needed to expressly prohibit companies from doing things we do not want them to do. Who is in a better position to keep an eye on what is happening at a company than the employees? These potential witnesses need to be protected from their employers; otherwise, these witnesses will not come forward. The best way to protect them is to make it unlawful for companies to get rid of these workers. If their jobs are protected, they will be more

likely to come forward.

Third, if someone accuses you of doing something that is inappropriate, it is human nature to want to defend yourself. The more reprehensible the act, the stronger the urge to defend. However, it is a slippery slope from defense to vindication to retribution. “We have an old saying in Delta. ‘Don’t get mad. Get even.’” When D-Day says that to Flounder in “Animal House,” it is funny. When it appears in an interoffice email between two supervisors, it is a smoking gun admission that leads a jury to ask, “Can we award more than what the plaintiff is asking for?”

## **What To Do About Retaliation Allegations**

How do we deal with this mushroom cloud of retaliation allegations?

First, as in-house counsel, you should know the circumstances under which these claims may arise. It is really amazing how many statutes out there protect employee complaining, witnessing alleged misconduct and whistleblowing. In addition to retaliation for making Title VII claims, there are statutes that protect employees from retaliation if they:

- Complain about wage and pay (Fair Labor Standards Act)
- Complain about working conditions that affect coworkers (National Labor Relations Act)
- Complain about safety and health issues (Occupational Safety and Health Act)
- Complain about financial mismanagement (Sarbanes–Oxley Act)
- File a workers’ compensation claim (In Texas, this is covered by the Texas Labor Code. Other states may have similar laws.)
- Attempt to prevent fraudulent claims to the U.S. for payment (False Claims Act)
- Exercise rights or prevent attainment of benefits under employee benefit or pension plans (Employee Retirement Income Security Act)

In addition to those statutes that span across industries to protect employees who complain or blow the whistle, there are several industry-specific statutes. For example, truck drivers who report a dangerous vehicle or refuse to drive a dangerous vehicle are protected by the Surface Transportation Act. Though there are laws pertaining to multiple industries, there are more statutes addressing the health care industry than any other. One national statute, the Emergency Medical Treatment and Active Labor Act, protects physicians or hospital employees who refuse to transfer unstable patients or who report patient dumping.

Below are additional situations faced by health care employees that are covered by Texas statutes. Other states may have similar protections.

- Employees of hospitals, mental-health facilities and treatment facilities who report a violation of law or violation of rules under state codes or related state agencies (Texas Health and Safety

Code)

- Nurses who in good faith report to their employer any situation that they have reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory or accreditation standards (Texas Occupations Code)
- Assisted living facility employees who file a complaint, present a grievance or provide information relating to personal care services (Texas Health and Safety Code)
- Health care employees who file a complaint, present a grievance, or provide in good faith information relating to home health, hospice or personal assistance services (Texas Health and Safety Code)
- Employees of intermediate care facilities for the mentally retarded who report legal violations or cooperate in investigations of the facility (Texas Health and Safety Code)

Some of these protections are broad, while others are limited. You should review the statutes in order to best serve the employer. If you are unfamiliar with any of these statutes or need additional clarification, it is wise to consult an attorney who specializes in labor and employment.

Once versed in the statutes, you should ensure the employer knows what types of employee activity are protected under law from retaliation. In addition, recommend the employer follow the tips below to mitigate risks of retaliation lawsuits:

- **Suspend First, Terminate Later:** When a whistleblower has allegedly engaged in wrongdoing, remind the employer not to jump to the conclusion that the employee actually did something wrong. They should take time to conduct a thorough investigation. Another old expression rings true: "Measure twice, cut once." If the conduct is so egregious the employer does not want the suspect on the premises, or if having the person on the premises will compromise the investigation, advise the employer to suspend the employee pending the outcome of the investigation.
- **Let Time Pass:** As you know, the temporal proximity between protected conduct and adverse action does not necessarily determine liability, but the shorter the period of time between the protected conduct and adverse action, the more likely it is that someone will connect the two events and conclude one caused the other to happen. The more time that passes between the two events, the less likely it is that the two will be seen as connected. Remind employers that it is often wise to bide one's time.
- **Consider Past Practices:** Your whistleblower is accused of having done something wrong, and your investigation supports your conclusion that corrective action has to be taken. If this is the case, you should sit down with the employer and review how past situations have been handled

and ensure consistency in your approach.

- **Create a Culture Where Questioning and Reporting are Encouraged:** Work with the employer to create a policy that says retaliation will not be taken against employees who ask questions or report information that might be damaging to the company. In addition, you should advise employers to go one step further and let employees know their employment is not at peril if they bring forth negative information. The more employees see the employer's interests are aligned with theirs, the more likely they will be forthcoming with needed information. After all, Enron had a lengthy code of ethics, but reading it and knowing what happened there are two entirely different things.
- **Offer an Explanation:** If adverse action is going to be taken against an employee, the employer should be able to explain the reasoning. Before ever taking action, you and the employer should ensure the adverse action makes sense and is unrelated to the protected activity. You and the employer also should develop a thoughtful response to the inevitable question, "Why is this happening?" If you do not tackle this question head on, the fertile mind of the employee and the jury will take hold and start making assumptions and leaping to conclusions. Assumptions and conclusions such as, "The employer's actions are illegally motivated and are just trying to cover up what was done." And remember, the employee is going to have to prove "but for" engaging in the protected activity, the adverse action would not have taken place. How does your explanation stand up against that?
- **Keep the Story Consistent:** Remind the employer to keep the story consistent, especially if brought to trial on claims of retaliation. As you know, a jury will assume the inconsistent story teller is lying. Make sure the employer is adequately prepared.
- **Have a Witness at All Interviews:** If a meeting foreseeably could lead to one of those "he said/she said" moments, make sure the employer has a witness present. Employers have the right in most cases to insist upon the witness of their choice. The employee does not get a say as to who the witness will be. Have the witness do something more than just sit there. For example, the witness can be an extra set of ears and eyes; let the witness be a note taker, leaving the employer the freedom to closely listen to what is being said. Later, your witness can be invaluable if needed to rebut any allegations of whether the employer bullied or intimidated the person being questioned.

Modern business owners and their in-house counsel can no longer ignore the fact that retaliation claims are part and parcel of the employment law mosaic with which they must deal. Just because their numbers are rising does not mean they should be feared. Instead, recognize employees have this additional avenue for contesting the employer's adverse action against them. Even if the underlying discrimination claim has no merit, retaliation claims can have a life of their own.

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