

5 TIPS TO AVOID WORKPLACE RETALIATION CLAIMS

Insights
Aug 10, 2023

Employers know how important it is to comply with workplace anti-discrimination laws – but equally important is ensuring that employees who complain about perceived discrimination are not retaliated against for doing so, even if the underlying claim is never proved. Why is this so important? Retaliation is the most common type of claim filed with the Equal Employment Opportunity Commission (EEOC). Moreover, these claims can be costly and negatively impact employee morale. The good news is you can minimize your chances of being on the receiving end of a retaliation complaint by developing sound policies and following certain best practices. Here are five tips for employers from Fisher Phillips attorney Stephen Gee and EEOC Commissioner Keith Sonderling.

1. Recognize What Qualifies as Protected Activity

The EEOC — as well as other federal, state, and local agencies — enforces laws that protect employees and applicants from discrimination based on a variety of characteristics, including age, disability, national origin, race, religion, and sex. These laws also make it unlawful for employers to retaliate against workers for bringing such claims.

“Oftentimes, an employee will be discriminated against first because of a protected characteristic,” says EEOC Commissioner Keith Sonderling. “Then, once they have exercised their right to complain of discrimination or participate in the EEO process, retaliation claims can occur.”

Related People



Stephen R. Gee

Partner

248.540.7041



Lisa Nagele-Piazza

Legal Content Counsel

404.760.7943

According to EEOC data, more than half of all charges filed in recent years included a retaliation claim — making it essential for employers to have sound practices in place to prevent retaliation and document the reasons for disciplining and firing employees.

“Participating in a complaint process is protected from retaliation under all circumstances,” according to the EEOC. Notably, the complaint doesn’t have to be formal to be protected. “Other acts to oppose discrimination are protected as long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe it,” the agency says.

An employee’s protected activity can take many forms. Examples include:

- Filing an EEO charge, complaint, or lawsuit.
- Serving as a witness or answering questions during an EEO investigation.
- Reporting employment-related discrimination or harassment to a supervisor.
- Declining to follow directives that would result in discrimination.
- Refusing sexual advances or intervening to protect others from sexual harassment.
- Requesting an accommodation for a disability or religious practice.
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages.

“Employers may mistakenly believe that only full-time, current employees have protections against retaliation,” Sonderling notes. However, these protections apply to job applicants; current full-time, part-time, probationary, seasonal, or temporary employees; and former employees covered by EEO laws, regardless of citizenship or work authorization.

Additionally, employees are protected from retaliation when they complain about perceived discrimination against co-workers.

Service Focus

Counseling and Advice

Employment Discrimination and Harassment

2. Train Supervisors on Common Pitfalls

Why are retaliation claims so common? “There are a multitude of reasons,” says Fisher Phillips attorney Stephen Gee. Perhaps a manager has been inconsistent in applying and enforcing the company’s employment policies. Or maybe a supervisor took an employee’s discrimination allegation personally and identified the employee for a subsequent layoff.

“For several reasons, retaliation can be a knee-jerk reaction,” Sonderling explains. No one wants to be accused of wrongdoing. So when an applicant or employee engages in protected activity, such as filing an EEO complaint, it’s natural to take it personally, he says.

Also, an untrained supervisor may see employees who complain as causing problems for the organization and may attempt to deter employees from continuing to participate in the complaint process—or even decide to fire them to remove the “problem” entirely.

“Unfortunately, employers may not realize or remember in the moment that these actions may be unlawful and constitute retaliation under EEO laws,” Sonderling notes.

Retaliation claims are also so prevalent because retaliatory conduct “encompasses a broad range of actions,” he says. Maybe supervisors simply don’t understand what conduct is retaliatory.

Supervisors should recognize that they cannot punish an applicant or employee for participating in the EEO process. This includes participating in an employer’s internal EEO complaint process.

Supervisors and managers may also make the mistake of thinking that only firing an employee counts as retaliation. However retaliatory conduct includes much more. For example, retaliation may include the following actions:

- Work-related threats, warnings, or reprimands.
- Lowered ratings on performance evaluations.
- Transfers to less prestigious or less desirable positions or worksites.

- Closer scrutiny of the employee's work than of other employees' without a legitimate reason.

3. Establish a Process for Handling Complaints

Employers should consider assigning a designated management official, in-house counsel, or an HR staff member to review proposed employment actions and ensure they are based on legitimate nondiscriminatory and nonretaliatory reasons, Sonderling recommends.

Additionally, management and human resource professionals should be trained on how to properly and proactively respond when employees raise concerns about potential EEO violations, such as asking clarifying questions and seeking additional information to ensure they fully understand the employee's concern.

"Training can also help ensure that discipline and performance evaluations are motivated by legitimate, nonretaliatory reasons," Sonderling says.

4. Discipline for Legitimate Reasons

Although employers are prohibited from retaliating against workers for engaging in protected activity, employees can still be disciplined or fired for legitimate reasons. Before taking adverse action, employers should ensure the decision is:

- Not based on the worker's age, disability, national origin, race, religion, sex, or other protected category.
- Not based on the worker's decision to oppose or report discrimination, or to participate in an investigation or lawsuit.
- Consistent with the company's disciplinary policy or justified when deviating from the policy.

Employers should consider documenting employment decisions to help defend against possible discrimination charges.

5. Create and Follow Consistent Practices

Consistency is key. "Employers should seek to be as consistent as possible in applying their employment policies," Gee says. "If an employer has to deviate from a

past practice, it should consult with legal counsel to ensure the deviation is justified.”

Failing to apply policies evenly can lead to perceptions that certain workers are being singled out for filing a complaint or participating in a workplace investigation, he explains.

“Employers should ensure they have a strongly written anti-retaliation policy that is communicated to all staff,” he recommends. Employers should also clearly inform employees that retaliation is prohibited and that they should report any perceived retaliatory behavior immediately. All complaints should be promptly and thoroughly investigated, he adds.

Sonderling says policies should be written in plain language and should include the following:

- Examples of retaliatory actions.
- Proactive steps to avoid actual or perceived retaliation.
- A reporting mechanism for raising concerns about retaliation.
- A clear explanation that employees may be disciplined or fired for engaging in retaliatory behavior.

Your attorney can help you create such policies and review your practices for compliance.

Conclusion

We will continue to monitor developments in this area and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact the authors of this Insight or your Fisher Phillips attorney.

A version of this Insight originally appeared in [SHRM's HR Magazine](#). ©2022. All rights reserved. Republished with permission.