



EQUAL EMPLOYMENT OPPORTUNITY



Supervisors Advanced Series Installment #2: Retaliation



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Part 1: Instruction



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RETALIATION

EEO laws that prohibit Retaliation and Related Conduct

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Title V of the Americans with Disabilities Act (ADA)
- Section 501 of the Rehabilitation Act (Rehabilitation Act)
- Equal Pay Act (EPA)
- Title II of the Genetic Information Nondiscrimination Act (GINA)
- Notification and Federal Employee Anti Discrimination and Retaliation Act of 2002 (No FEAR Act)



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RETALIATION

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces. The EEO anti-retaliation provisions ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without employers taking materially adverse actions in response.

Retaliation is now the most frequently alleged basis of discrimination in all sectors, including the federal government workforce.



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RETALIATION-Who is Protected?

- Current employees (full-time, part-time, probationary, seasonal, and temporary; both NAF and AF)
- Applicants
- Former employees
 - Regardless of citizenship or work authorization status



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RETALIATION

All Federal EEO laws prohibit employers, employment agencies, or unions from punishing job applicants or employees for asserting their rights to be free from employment discrimination, including harassment.



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Elements of RETALIATION

A retaliation claim challenging action taken because of EEO-related activity has three elements:

- (1) **protected activity**: "participation" in an EEO process or "opposition" to discrimination;
- (2) **materially adverse action** taken by the employer; and
- (3) requisite level of **causal connection** between the protected activity and the materially adverse action.



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RETALIATION – Protected Activity

Asserting EEO rights is called “protected activity”

Sometimes retaliation exists before any “protected activity”, i.e., an employment policy that discourages the exercise of EEO rights could itself be unlawful.



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RETALIATION - Protected Activity

It is unlawful to retaliate against applicants or employees for:

- taking part in an internal or external investigation of employment discrimination, including harassment;
- filing or being a witness in a charge, complaint, or lawsuit alleging discrimination;
- communicating with a supervisor or manager about employment discrimination, including harassment;
- answering questions during an employer investigation of alleged harassment;



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RETALIATION - Protected Activity

...continued:

- refusing to follow orders that would result in discrimination;
- resisting sexual advances, or intervening to protect others;
- reporting an instance of harassment to a supervisor;
- requesting accommodation of a disability or for a religious practice; or
- asking managers or co-workers about salary information to uncover potentially discriminatory wages.



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RETALIATION - Participation

- An individual is protected from retaliation for having made a complaint, testified, assisted, or **participated** in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA.
- Participation may include, for example, filing or serving as a witness in an administrative proceeding or lawsuit alleging discrimination.



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RETALIATION - Opposition

- An individual is protected from retaliation for **opposing** any practice made unlawful under the EEO laws.
- Protected "**opposition**" activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination.
- The manner of opposition must be reasonable, and the opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful.



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RETALIATION - Opposition Examples

It is unlawful to retaliate against an applicant or employee for:

- complaining or threatening to complain about alleged discrimination against oneself or others;
- providing information in an employer's internal investigation of an EEO matter;
- refusing to obey an order reasonably believed to be discriminatory;
- advising an employer on EEO compliance;
- resisting sexual advances or intervening to protect others;



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RETALIATION - Materially Adverse Action

Retaliation expansively reaches any action that is "**materially adverse**," meaning any action that might deter a reasonable person from engaging in protected activity.

When an individual alleges retaliation in a complaint, they do not need to make a showing of an official employment action.

- Work-related Actions
- Not Work-related Actions



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RETALIATION - Work-Related Actions

- Denial of promotion
- Refusal to hire
- Denial of job benefits
- Demotion
- Suspension
- Discharge
- Threats
- Warnings
- Reprimands
- Transfers
- Negative or lowered evaluations
- Transfers to less desirable work or work location
- Any other type of adverse treatment that in the circumstances might dissuade a reasonable person from engaging in protected activity



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RETALIATION - NOT Work-Related Actions

- Disparaging the person to others or in the media;
- Making false reports to government authorities;
- Filing a civil action;
- Threatening reassignment;
- Scrutinizing work or attendance more closely than that of other employees, without justification;
- Removal of supervisory responsibilities;



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RETALIATION - NOT Work-Related Actions

- Abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment;
- Requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity;
- Terminating a union grievance process or other action to block access to otherwise available remedial mechanisms;
- Any other action that is reasonably likely to deter the aggrieved or other individuals from engaging in protected activity



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RETALIATION - Third Party

- Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee



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RETALIATION - Possible Evidence

- Suspicious timing
 - The causal link between the adverse action and the protected activity is often established by evidence that the adverse action occurred shortly after the plaintiff engaged in protected activity
- Oral or written statements
 - made by the individuals recommending or approving the challenged adverse action may reveal retaliatory intent by expressing retaliatory animus or by revealing inconsistencies, pre-determined decisions, or other indications that the reasons given for the adverse action are false



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RETALIATION - Possible Evidence cont...

- Comparative evidence
 - An inference that the adverse action was motivated by retaliation could also be supported by evidence that the employer treated more favorably a similarly situated employee who had not engaged in protected activity.
- Inconsistent or shifting explanations
 - If the employer changes its stated reason for the challenged adverse action over time or in different settings (e.g., reasons stated to employee in termination meeting differ from reasons employer cites in position statement filed with the EEOC), pretext may be inferred
- Other Evidence



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RETALIATION - Promising Practices

- Although each workplace is different, there are many different types of promising policy, training, and organizational changes that employers may wish to consider to minimize the likelihood of retaliation violations. Some promising practices include:
 - Written, plain-language anti-retaliation policy
 - Training all employees, managers, supervisors (regularly)
 - Sending email to ALL about zero-tolerance



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RETALIATION - Promising Practices

Tips for Supervisors

- Take advantage of Subject Matter Experts
- Document, Document, Document
- Do not take things personally
- Be consistent
- Be transparent

**“PERFORMANCE AND CONDUCT ARE ALWAYS
ON THE TABLE”**



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RETALIATION – Who are your SMEs?

- MCIPAC EEO Office
- HR Employee Relations
- Inspector General
- Legal



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Part 2: Scenarios