



How to Avoid Retaliation Claims

A retaliation claim could cost you big bucks. Here's how to keep it from happening to you.

BY FRANK SOLANO AND BRIAN H. KLEINER

Retaliation claims are the fastest-growing type of workplace complaint.¹ Courts have assigned huge monetary awards in such cases. For example, a Texas jury awarded \$10 million in punitive damages to five workers who claimed their employer retaliated against them after they filed workers' compensation claims.

The court system is very harsh against employers who retaliate against whistleblowers.

What Is Workplace Retaliation?

The law states that an employer may not retaliate against those who do any of the following:

- **File or threaten to file** a charge or complaint with a court, agency, or union.
- **Assist** in an investigation.
- **Complain** about discrimination (including formal complaints and just complaining informally about discrimination by the employer).
- **Refuse to obey an order** believed to be discriminatory.
- **Request reasonable accommodations** for a disability before performing a task.

- **Disclose proof** that the employer violated the law. (Workers who do so are known as "whistleblowers." The court system is very harsh against employers who retaliate against whistleblowers.)²

Examples of retaliation taken by employers include the following:

- **termination** or suspension of the employee or the employee's spouse
- **demotion** or denial of the employee's promotion
- **verbal or physical threats** or reprimands against the employee
- **refusal to grant the employee's transfer** to another position
- **assignment** of undesirable duties
- **refusal** to hire the employee
- **negative references** provided to potential employers.

Post-employment retaliation is also protected by the courts. In 1997, the Supreme Court ruled that an employer who acts with the purpose of making it difficult for a former employee to obtain a new job is guilty of retaliation.

How Is Retaliation Proved?

To take their employers to court, workers must prove the following three elements:

- **The worker was against an act** practiced by the employer, or the worker participated in a court proceeding or other protected activity.
- **The employer took an adverse action** against the worker.
- **There is a connection** between the worker's activity and the employer's adverse action.

Are You Liable for Retaliation?

To see if an employer is likely to be found guilty of retaliating against a worker, answer the following questions:

1. **Did the worker talk to anyone** about the alleged discrimination or unlawful practice by the employer?

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2. Was the complaint made reasonably and in good faith?

3. Did the worker ever participate in any court investigation, hearing, or litigation related to their work? If the answer to question 3 is yes, then the worker participated in what the court calls “protected activity.” If yes, go to question 4. If the answer to these first three questions is no, then the employer probably won’t be liable for retaliation charges.

4. Did the employer take any adverse action against the worker? (These actions include harassment, threats, negative job evaluations, firing, providing negative references, and other retaliatory activities.) If the answer is yes, go to question 5.

5. Was the employer justified in taking action against the worker? If so,

the employer must furnish documentation to prove justification. Some examples of justifiable reasons include excessive tardiness, absenteeism, consistent violation of policies, or abusive behavior by the worker. The employer will need to give the court written, dated documentation of these worker incidents and the actions the employer took on each incident. If the answer to question 5 is no, the employer may be held liable and should seek legal advice.

How Can You Avoid Retaliation Claims?

- **Develop** a retaliation policy. In your policy, make it clear that retaliation won’t be tolerated. Detail the actions you’ll take against anyone guilty of retaliation.

- **Create** written instructions for employees and management on how to report retaliation incidents. Make it clear that employees may report retaliation to more than one manager. Such a policy will ensure fairness and avoid intimidation.
- **In your employee handbook, include** a statement promising that the organization won’t retaliate against anyone who reports incidents of discrimination or harassment.
- **When employees complain, express your appreciation** for the information provided. Ask them to report any further events after they file the complaint. Follow up on all complaints promptly.
- **Keep written and dated documentation** of all claims of discrimination or harassment.
- **Take** retaliation claims seriously.
- **Follow** formal procedures and investigation to explore claims of retaliation. For major retaliation complaints, hire an outside investigator. Doing so can help you prove your goodwill to the courts.
- **Distribute** your retaliation policy to all employees. Have managers review the policy with staff. Post the policy on the intranet and on public-relations boards for easy access by employees. Just having a policy isn’t enough to protect yourself from lawsuits; you must be able to prove that employees were aware of the policy and understood it.
- **Hold a mandatory training course** for new employees during their first few days on the job, and train them about your anti-discrimination, harassment, and retaliation policies. Review these policies regularly with staff.
- **Educate managers** on ways to prevent discrimination and harassment in the workplace. A well-trained management team can greatly reduce your exposure to retaliation claims.
- **Create** formal discipline procedures. Use those procedures to discipline anyone who isn’t following your policies.
- **Document** all disciplinary incidents.

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A well-trained management team can greatly reduce your exposure to retaliation claims.

Where Can You Get Help?

The following resources will help you develop a preventative retaliation policy:

EEOC Guidelines. The Equal Employment Opportunity Commission has an excellent guide to help you create your policy. You can receive a copy of the guidelines through their Web site, www.eeoc.gov.

www.Workforce.com. This Web site provides information related to human resources. It also publishes a list of the most recent legal rulings that affect the workplace. You can subscribe to this site and receive customized information via e-mail.

www.thompson.com. This Web site provides a list of newsletters, books, and

articles related to workplace retaliation, sexual harassment, and ADA compliance.

Professional Human Resource Consultants. You can hire a consultant or human resource organization to manage your personnel needs. Companies such as CCH Incorporated offer human resource management, payroll, employment benefits, and work safety publications.

Nonprofit World Articles and Publications. See these and other resources from *Nonprofit World*, available from the Society's Resource Center, www.snpo.org: "Protect Yourself Against Employee Lawsuits" (Vol. 15, No. 2), "Nonprofits and the Americans with Disabilities Act" (Vol. 11, No. 2), "Sexual Harassment: Don't Let It Destroy Your Organization" (Vol. 10, No. 2.), "To Write or Not to Write: Do You Need a Personnel

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Footnotes

¹According to the Equal Employment Opportunity Commission (EEOC), retaliation claims increased from 7,900 in 1991 to almost 20,000 in 1999. See www.eeoc.gov.

²In a recent case, an employee alerted management of a number of illegal acts, including sexual harassment. He was terminated and later sued. The jury awarded him \$23.3 million. See "Whistleblowers Are Protected from Retaliation by Employer," www.Workforce.com.

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