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THE RISING TIDE OF RETALIATION CLAIMS

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November 2000

Reviewed August 2002

During the past five years, charges filed with the U.S. Equal Employment Opportunity Commission alleging retaliation have increased significantly. In 1994, these charges represented 17.4 percent of the EEOC's docket. They now comprise more than 25 percent of all EEOC charges. (Data can be found at <http://www.eeoc.gov/stats/charges.html>.) In contrast, charges alleging job discrimination based on race, sex, national origin, age and disability have decreased.

Retaliation claims are plaintiff's lawyers' most powerful weapon. (See "Retaliation Claim is Top Weapon for Fired Workers," *Lawyers Weekly USA*, March 6, 2000: 193.). These lawyers say that such claims are generally easier to prove and result in bigger verdicts than other discrimination claims. Jurors readily recognize that, as a matter of human nature, a supervisor accused of discrimination would likely want to lash back at the employee. As one defense lawyer has commented, employers are spurred to retaliate against employees because they perceive the filing of a discrimination complaint as an extreme act of disloyalty. (See "Retaliation Against Employees Spurred by Employers' Perception of Disloyalty," *BNA Employment Discrimination Report*, November 1, 2000: 610.)

What Sorts of Actions Can be Challenged as Retaliatory?

It is the position of the U.S. Equal Employment Opportunity Commission that a retaliatory act violates the anti-discrimination laws if it is "reasonably likely to deter protected activity." Thus, while petty slights and trivial annoyances are not actionable, retaliatory harassment, threats, transfers and other more significant adverse treatment can be challenged. (The EEOC's most recent policy document on retaliation claims can be found at <http://www.eeoc.gov/docs/retal.html>.)

Courts are split with regard to the nature of acts that can be challenged as retaliatory. The Ninth Circuit has adopted the EEOC's standard. In *Ray v. Henderson*, the court ruled that the plaintiff had an actionable claim where his supervisors, in retaliation for his complaints concerning management's treatment of female employees, subjected him to verbal abuse and other punitive actions. That court, along with three other circuit courts of appeal, have also permitted claims based on management's failure to correct retaliatory harassment by co-workers. On the other hand, certain other courts have adopted a more restrictive standard, only permitting retaliation claims that challenge "ultimate employment actions" such as discharge and failure to promote.

The Supreme Court, in *Robinson v. Shell Oil Co.*, held that retaliation can be challenged even if the act occurred after the employment relationship between the complainant and the

employer ended. Thus, if a complainant's former supervisor gives a negative job reference in retaliation for his having filed a discrimination charge, then a violation would be found. Even the mere disclosure of information to prospective employers about the individual's charge could be found unlawful, since there would not likely be a legitimate reason to provide such information.

How Can Retaliation Be Prevented?

It is critical that employers take steps to prevent retaliation against individuals who complain about discrimination or provide information related to discrimination complaints. By preventing retaliation or correcting it at an early stage, employers can avoid litigation or minimize damages in suits that are filed.

To prevent retaliation, employers should take the following steps:

- **Adopt and disseminate a strong anti-retaliation policy.** While this can be contained in your organization's anti-discrimination and anti-harassment policies, a separate anti-retaliation policy may be more effective. The policy should make clear that your organization will not tolerate retaliatory conduct based on an employee's opposition to job discrimination or harassment or participation in discrimination complaint proceedings.
- **Inform employees about the process for reporting alleged retaliation.** Your organization's anti-retaliation policy should explain whom employees should go to in order to report retaliation. For example, you might instruct employees to go to anyone in their chain of command or your organization's human resources office.
- **Train managers on the subject of retaliation.** Training is particularly important because individuals accused of discrimination may unconsciously lash back at the accuser or witnesses. Managers should be trained on acceptable and unacceptable responses to protected activity under the anti-discrimination laws.
- **Remind supervisors who are accused of discrimination of the company's policy prohibiting retaliation against the complainant or witnesses.** Make clear to supervisors that they will be subjected to disciplinary action if they retaliate against individuals who complain of discrimination or provide information related to a discrimination complaint.
- **Monitor the treatment of employees who complain of discrimination or provide information related to discrimination complaints to ensure that they are not subjected to retaliation.** Carefully scrutinize any proposed adverse action against a discrimination complainant or witness to ensure that it is based on a legitimate and not retaliatory reason.
- **Investigate allegations of retaliation and take prompt corrective action when retaliation occurs.** Retaliation should be stopped even if it is not significant enough to violate federal law. Such corrective action prevents the retaliation from escalating to the point that the law is violated.

If unlawful retaliation occurs despite these efforts, your organization's preventive and corrective measures will help to limit its liability. Promptly stopping retaliation cuts off the harm to the victim, thereby limiting the compensatory damages to which he or she would be entitled. Moreover, a court will not award punitive damages if the retaliating manager's actions were contrary to your organization's good faith efforts to comply with the law.

Thanks To Elaine Herskowitz for contributing this article. It is intended as information only and is not a substitute for legal or professional advice. Elaine Herskowitz, Esq., provides training and consulting on equal employment opportunity issues. Ms. Herskowitz previously served as a senior staff attorney at the U.S. Equal Employment Opportunity Commission. While there, she drafted policy documents and provided guidance to EEOC senior personnel, investigators, and attorneys. Ms. Herskowitz can be contacted at 301-299-0234 or by e-mail at herkow@comcast.net.

This paper was funded by a generous grant from the [SHRM Foundation](#).

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