

Preventing Retaliation

Office of the General Counsel
Civil Rights, Labor and
Employment Law Division

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OGC, Civil Rights, Labor and Employment Law Division (CRLELD) Structure

- Associate General Counsel, CRLELD – Steven Brammer
- CRLELD – Litigation Section
 - Assistant General Counsel – Steven Brammer
 - Handles employment discrimination cases (after a request for a hearing) and program discrimination litigation
 - Also handles MSPB appeals, FLRA actions, Foreign Service grievances, and labor litigation
 - Both administrative and Federal court litigation

CRLELD Structure Continued

- CRLELD – Risk Management Section
 - Assistant General Counsel – Emily Tasman
 - Advice to OASCR and Mission Area CR Directors on processing of informal EEO complaints
 - All EEO matters prior to a request for hearing
 - Advice to Agency management officials on civil rights issues, reasonable accommodation requests
 - All policy matters for both employment discrimination and program civil rights
 - Advice and counsel on labor and employee relations, human resources, veterans' issues

Learning Objectives

- Understand the legal parameters of retaliation
- Identify what types of employment actions and what circumstances may constitute unlawful retaliation.
- Understand the impacts of retaliation
- Discuss practical tips for preventing retaliation

Retaliation

- Retaliation refers to prohibited acts of reprisal against those who file EEO complaints or who otherwise participate in the EEO process as representatives, witnesses, investigators, counselors, or program officials.
- Acts of reprisal are prohibited by EEOC regulation at 29 CFR § 1614.101(b).
- Retaliation can take other forms; today we're focusing on retaliation for participating in the EEO process.

In Other Words

- An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination.
- EEO laws also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding, even though they are not the person who filed the complaint.

What is Retaliation?

- Retaliation occurs when an employer takes a:
 - **materially adverse action** against a
 - **covered individual** because they engaged in a
 - **protected activity.**

Retaliation: *Prima Facie* Claim

- A person can establish a *prima facie* claim of reprisal by showing that:
 1. They engaged in a **protected EEO activity**
 - Participation Clause
 - Opposition Clause
 2. Subsequently, they were subjected to adverse treatment (**materially adverse action**) by the Agency; and
 3. A nexus exists between the protected activity and the adverse treatment (i.e. there is some sort of **causal connection**).

What is protected EEO Activity?

- Protected EEO activity includes:
 - **participating** in the EEO process, or
 - reasonably **opposing** discrimination (opposing any conduct or practice that is unlawful under an EEO law).

Examples of Protected Activity: Participation Clause

- Contacting EEO Counselor, even if a formal complaint is not filed
- Filing a formal EEO Complaint
- Participation in an EEO mediation
- Providing an Affidavit in an EEO matter
- Providing information in an Agency investigation
- Testifying in an EEOC case
- Representing a Complainant
- Reporting an incident of harassment
- Requesting a reasonable or religious accommodation
- Encouraging another employee to assert their EEO rights

Examples of Protected Activity: Opposition Clause

Examples of Opposition:

- Resisting sexual advances.
- Refusing to obey an order reasonably believed to be discriminatory.
- Informing a manager or employee that a decision, action or policy is discriminatory.
- Opposing any practice made unlawful by an EEO law.

More on Protected Activity: Opposition

- The employee does not have to be correct in their belief of a violation of the law; they only need to have a reasonable, good faith belief.
- The employee's manner of opposition must be reasonable. i.e., opposition to someone with authority to take appropriate action.
 - Complaining to co-workers or subordinates is not sufficient.

What is an Adverse Action?

- An adverse action is a negative change in a term or condition of employment.
- The alleged action must be “materially adverse,” which means it is reasonably likely it would have deterred a person from engaging in EEO activity.
- However, it does not need to be “severe or pervasive,” as for a harassment claim.

Examples of Adverse Actions for Retaliation Claims

- Denial of promotion
- Refusal to hire
- Denial of job benefits
- Demotion
- Suspension
- Change in shift or hours of work
- Lateral transfer to a less desirable job
- Threatening reassignment
- Additional or fewer job responsibilities
- Withdrawal of support
- Increased surveillance
- Warnings or reprimands
- Exclusion from training that contributes to professional advancement
- Treating the employee differently in any way

Anticipatory Retaliation – Chilling Effect

- The prohibition includes conduct that would cause a ***reasonable employee*** to refrain from engaging in the protected activity.
 - An employment policy itself could be unlawful if it discourages exercising EEO rights.
- Conduct that could have a “chilling effect” on the EEO process.
 - Any adverse treatment based on retaliatory motive that is reasonably likely to deter the charging party or others.
 - Example: Referring to people who file EEO complaints as “complainers” or “troublemakers.”

Anticipatory Retaliation: Directions re: Following Chain of Command

- Be very careful when directing employees to go through their chain of command to express grievances or taking adverse action for failure to go through the chain of command.
 - It could be perceived as discouraging employees from opposing/reporting discrimination or harassment to higher levels of authority.
 - Clarify that “chain of command” directions only apply to non-EEO matters.
 - Written directions must also contain specific Whistleblower Protection language – get this from ER.

Case Study: *Terisa B. v. Dep't of Defense*, EEOC Appeal Nos. 0120180570, 0120181692, 2019002121 (Sept. 4, 2019)

- Terisa complained to her supervisor about a coworker squeezing her shoulder, and another co-worker who, in praising Terisa's work, said "I love you! In fact, I'd give you a big hug, but I'd probably get in trouble!" The supervisor asked Terisa if she wanted him to take any action, and Terisa responded "no."
- The supervisor then told Terisa that management did not like people who tattle on others and indicated that it is easier to get rid of "troublemakers" who are probationary employees. Terisa was a probationary employee.

Did the EEOC find retaliation?

- No, because Terisa did not initiate an EEO complaint, and she told her supervisor that she did not want to take any EEO action.
- Yes, because the supervisor's statements would discourage a reasonable person from pursuing an EEO complaint.

Causal Connection

- A causal connection is a nexus between the protected activity and the adverse treatment.
- Causal connection may be shown by:
 - Temporal proximity (Close in time);
 - Statements made linking the action to the EEO activity; and
 - Actions taken without proper justification which raises or creates suspicion that the action may be due to an employee's protected activity.

Who is Protected from Retaliation?

- Those protected from retaliation include:
 - Applicants;
 - Employees;
 - Former employees; and
 - Third parties who can be subjected to adverse employment actions based on their relationships with individuals who have engaged in EEO activity.

Covered Individuals Include Those with Close Association

- Those with close association with someone who has engaged in such protected activity are also covered individuals.
 - Example:
 - Terminating an employee because their spouse participated in employment discrimination litigation.
 - Protection can extend to a person's fiancé who participated in the EEO process.

Protected Activity is NOT Insulation From Accountability

- Engaging in protected EEO activity (participation or opposition) does NOT insulate the employee from consequences for misconduct or poor performance.
- Supervisors are free to discipline or remove employees for non-discriminatory, non-retaliatory reasons, even if the employee has engaged in protected activity.

Case Study: *Eleni M. v. Dep't of Transportation*, EEOC Appeal No. 0720160021 (July 25, 2018)

- Eleni made a harassment complaint against her supervisor. In the context of a forensic investigation, it was discovered that Eleni and several other employees had images on their computers that were in violation of the Agency policy. Eleni was issued a Letter of Counseling that advised her to remove the images.
- While the letter was not considered formal discipline and was not retained as part of her Official Personnel File, Eleni was advised that management would keep the letter indefinitely in case it was ever necessary to establish that she was on notice of the fact that possession of these images violated Agency policy. No other employee received a similar Letter of Counseling.

Did the EEOC find retaliation?

- No, because the Agency had a legitimate need to address Eleni's violation of Agency policy.
- Yes, because the Agency did not explain why it did not issue a Letter of Counseling to others who engaged in a similar violation.

Case Study: *Choe v. United States Postal Service*, EEOC Appeal No. 0120071407 (July 16, 2007)

During a meeting to discuss the complainant's EEO complaint, the complainant made gestures with his hand as though he was shooting and made comments suggesting that he was very angry and there would be a shooting at his workplace. Several hours after the meeting, the complainant was told he was being placed on emergency leave status due to his comments and behavior at the meeting.

Did the EEOC find retaliation?

- No, the agency had a legitimate, non-retaliatory reason to place the complainant on leave while it investigated his statements that were reasonably perceived as a threat of violence.
- Yes, the complainant was put on leave in retaliation for protected EEO activity because the actions and statements were made during a meeting about his EEO complaint.

Standard of Proof: Burden Shifting

- If employee offers evidence that an adverse action is in response to a protected activity, the burden shifts to the Agency.
- The Agency must show a legitimate, nondiscriminatory basis for the action.
- Burden then shifts back to employee to prove the professed legitimate reason is just pretext for retaliation.

To Prove a Claim of Retaliation

- To prove a retaliation claim, an individual must establish that they engaged in prior protected activity; the employer took a materially adverse action; and retaliation more likely than not caused the employer's action.
- For employee to prevail in demonstrating a violation, evidence must show it is more likely than not retaliation has occurred.

Facts that May Support a Finding of Retaliation

- Close timing between the EEO activity and the materially adverse action;
- Verbal or written statements demonstrating a retaliatory motive;
- Comparative evidence (e.g., discipline for infraction that regularly goes undisciplined, or another employee with no EEO activity committed same infraction but was not disciplined as severely);
- Demonstrated falsity of the employer's proffered reason for the adverse action; and
- Other evidence which, viewed alone or in combination with other facts, may support an inference of retaliatory intent.

Facts that May Undermine a Finding of Retaliation

- Employer was not aware of the protected activity.
- Legitimate non-retaliatory motive for the challenged action, that the employer can demonstrate, such as:
 - poor performance;
 - inadequate qualifications for position sought;
 - qualifications, application, or interview performance inferior to the selectee;
 - misconduct (*e.g.*, threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and
- Similarly-situated applicants or employees who did not engage in protected activity were similarly treated.

Inconsistency May Be Evidence of Retaliation

- The law is well-established that the internal inconsistencies, implausibility, or contradictions in an employer's explanation of the challenged employment decision may be evidence of pretext for discrimination or retaliation.
- Comparative evidence showing inconsistency in how management responds to similar misconduct or performance problem may also be evidence of retaliation.

Why Do We have Retaliation Laws?

- Without retaliation laws, the purposes of the underlying laws may not be accomplished.
- If retaliation were not prohibited, almost no one would report illegal activity for fear of retaliation, and enforcement of the law would be difficult or impossible.

Why is Prevention of Retaliation so Important?

- Retaliation is illegal.
- Retaliation survives an underlying claim of discrimination that may lack merit.
- Retaliation carries a lower threshold for adverse actions – “likely to deter a charging party”
- Liability can extend past the actual employment – job references.

Impact of Retaliation

- In workplaces where there has been retaliation, employees may not feel comfortable reporting discrimination, so that the Agency can investigate and address conduct that violates the law or USDA or Agency policies.
- Retaliation can cause a decrease in job performance and satisfaction and create psychological distress.
- Retaliation in the workplace can lead to low morale and distract from the mission of the Agency.
- A finding of retaliation can lead to harm to the Agency's reputation.

How to Prevent a Retaliation Claim

- Ensure your reason for action was correct and did not change as a result of the prior EEO activity.
- Ensure you followed established procedures in implementing the adverse action.
- Ensure you treated the employee the same (no better or worse) as you would treat all other employees in the same situation.
- Ensure that you document your reasoning.

Do Not Take EEO Allegations Personally

- There are many reasons why an employee may file an EEO complaint.
- Employees have the absolute right to use the EEO process
- Do not treat a complaint as frivolous no matter how right you think that you are.
- Do not take unwarranted action against employees – complaints of reprisal are the easiest to prove.
- Avoid venting your frustrations and reactions to your colleagues in the workplace.
- Resist natural feelings of anger and defensiveness.

Show Respect for the EEO Process

- Show no preference for methods of resolving workplace issues other than the EEO process.
- Classic Mistakes:
 - “I wish you would have come to me instead of filing this EEO claim.”
 - “I am insulted that you would accuse me of discrimination.”
- It is fine to offer an “open door policy” but do not ask employees to use it in lieu of EEO process.

Case Study: *Carroll R. v. Dep't of the Treasury*, EEOC Appeal No. 2020002891 (Feb. 14, 2022) (#1)

During a training about the promotion selection process and interview skills, the manager providing the training stated that certain employees have “baggage” attached to them and that this “baggage,” even though it may not be true, will affect the outcome of the selection process. In her testimony during the EEO case, the manager stated that the term “baggage” referred to a candidate’s reputation but explained she does not consider reputation when interviewing candidates, because she believes it is not a permissible topic during an interview.

Did the EEOC find retaliation?

- No, because the manager who provided the training confirmed that she does not consider a candidate’s reputation when making selection decisions.
- Yes, the statements about candidates having “baggage” is per se reprisal because they were likely to deter a reasonable employee from engaging in protected EEO activity and have a potentially chilling effect on the EEO process.

Beware of Too Much Scrutiny

- When evaluating conduct and performance beware of too much scrutiny.
- Ask yourself:
 - Am I concerned with this employee's performance, or time and attendance more than any others?
- Beware of playing favorites.
- Ask yourself:
 - Do I give better assignments to employees that don't complain?

Case Study: *Irene M. v. Dep't of the Navy*, EEOC Appeal No. 2020001286 (Feb. 2, 2021)

After Irene initiated an EEO complaint, her supervisor recommended a lower rating for the element of personal leadership and responsibility, although the supervisor did not articulate why he thought her performance in this element was low.

After Irene protested, the Agency raised her rating.

Did the EEOC find retaliation?

- No, because the Agency ultimately raised Irene's rating.
- Yes, the supervisor's retaliatory intent could be inferred by his lack of a justification for the lower rating.

Avoid Addressing EEO Process and Performance/Conduct Concerns in the Same Communication

The EEOC found reprisal per se when a supervisor issued a memorandum to the complainant that (1) directly referenced the complainant's request for official time to work on his EEO complaint, and (2) advised the complainant that he needed to improve his conduct by following instructions regarding the official time granted, criticized the complainant's professionalism, and warned him that if he failed to act professionally, disciplinary action could be taken.

Darrin H v. Dept of Veterans Affairs, EEOC Appeal No. 2022001862 (Sept. 25, 2023)

Provide Honest and Accurate Appraisals

- Employees deserve to be kept informed about their progress.
- In EEO context, appraisals that drastically change from period to period are subjected to high scrutiny.
- Make sure performance elements and position descriptions match the current expectations for the positions and the actual functions of the jobs.

Preventing Retaliation: Selections and Promotions

- Ensure consistent interview questions and procedures during selection process.
- Ask managers and panel members to take, and keep, contemporaneous records of interviews during selection process.
- There should not be anything in anyone's notes that cannot be shared.

Case Study: *Carroll R. v. Dep't of the Treasury*, EEOC Appeal No. 2020002891 (Feb. 14, 2022) (#2)

- Carroll and his Agency settled an EEO complaint several years earlier. Since then, Carroll has not received any promotions or high-level assignments even though his team lead described Carroll's superior qualifications to leadership and recommended him for a more senior role.
- Evidence indicated that senior managers made the decisions on some promotional opportunities without posting notice of the vacancy, and just providing notice to some of Carroll's co-workers.

Did the EEOC find retaliation?

- No, because Carroll's prior EEO activity settled several years earlier. Too much time passed to establish retaliation.
- Yes, because management's ongoing pattern with respect to promotional decisions established a retaliatory intent.

Preventing Retaliation: Job References

- Develop a policy regarding the scope of employment references – and stick to it.
- Employee may be able to show you retaliated if you deviate from normal course of business in giving information to a prospective employer.
- A negative reference may be actionable even if the employee received the job for which they applied.

Document the Reasons for Your Actions

- Do not take any actions without a contemporaneous and detailed record to support the actions:
 - Performance Appraisals, Letters of Warning, and other written actions.
- Make sure documentation is signed and dated.
- Memos to the file are also a good tool.

Things that Must Be Avoided

- Do Not:
 - Take an action because of an employee's EEO activity;
 - Interfere with the EEO process;
 - Isolate the employee; or
 - Deny the employee information, equipment, or benefits provided to others performing similar duties.

Always Maintain Confidentiality

- Do not discuss the fact that an employee filed an EEO complaint with any other employees and only do so with other supervisors on a “need to know” basis.
 - This protects managers from involvement in complaints of reprisal.
- Only discuss with those who have the need to know, such as Agency Civil Rights or EEO staff.
- Do not discuss personnel issues with subordinates, and only do so with other supervisors on a “need to know” basis.

Case Study: *Jazmine F. v. Dep't of Justice*, EEOC Appeal No. 0120162132 (June 22, 2018)

- Jazmine's Office Director informed Jazmine's supervisor in her detail position that Jazmine was engaged in settlement discussions for an EEO complaint.
- The Director was the settlement authority for Jazmine's EEO complaint and was trying to develop an EEO settlement offer to resolve the complaint. One potential settlement option was offering Jazmine a permanent reassignment to her detail position, and the Director needed to determine if that office where Jazmine was detailed had a vacant position.
- The Director did not provide the detail supervisor with any specific information about Jazmine's EEO complaint.
- Did the EEOC find reprisal?
 - No, the Office Director had a legitimate, not-retaliatory reason for disclosing that Jazmine had a pending EEO complaint.
 - Yes, because it was not necessary for the Director to mention the EEO complaint when inquiring about a vacant position.

If an EEO Complaint is Filed

- Participate fully with EEO Counselor and EEO Investigator
 - Statement to Counselor and Affidavit are first – and possibly ONLY – opportunity to tell your side of the story – ensure that statement and Affidavit are completely accurate and thorough
 - Manager or other witness should be prepared to address all issues, and speak only to issues on which the person has personal knowledge
 - Provide all supporting documentation and identify other Agency witnesses
 - Avoid speculation, opinion, and hearsay
 - If you encounter problems with a Counselor or Investigator, contact Agency's Civil Rights Staff

Questions



Contact OGC

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