

UC BERKELEY DOES NOT TOLERATE RETALIATION

These FAQs explain UC Berkeley's prohibition on retaliation for participating in protected activities (as defined below), in keeping with our Principles of Community and the UC Standards of Ethical Conduct. The FAQs do not fully communicate all provisions of all relevant laws and policies relating to retaliation; specific instances of retaliation will be handled as appropriate in accordance with those laws or policies.

What is “retaliation”?

Generally, someone who has filed a complaint, acted as a witness, or engaged in another form of **protected activity** experiences retaliation when they are subject to an **adverse action** (as defined below) taken because they had engaged in the protected activity. The party alleged to have engaged in retaliation must have been aware of the protected activity at the time they engaged in the allegedly retaliatory behavior.

Who is protected from retaliation?

Anyone who engages in a **protected activity** is protected from retaliation. They are protected not only from adverse action taken against them personally, but also adverse action against someone closely associated with them, such as a partner or sibling.

What is “protected activity”?

The most common protected activity is filing a good-faith report under a UC or campus complaint procedure, reporting something that you reasonably believe to be misconduct, a policy violation, or an otherwise reportable event. Other protected activities include:

- Acting as a witness in an investigation or complaint resolution process
- Filing a complaint with an external regulatory agency
- Requesting an accommodation for a disability or religious belief or observance
- Requesting or taking FMLA leave
- Refusing to obey an illegal directive from your supervisor or manager
- Opposing employment discrimination
- Intervening in an instance of apparent sexual misconduct or harassment

What is “adverse action”?

Generally, adverse action is anything that would deter or dissuade a reasonable person (in the circumstances) from filing a complaint or engaging in other protected activity – if the action is taken because of the protected activity. Petty slights, minor annoyances, bad manners, and trivial inconveniences do **not** count as adverse actions.

Some (non-exhaustive) examples of possible adverse actions:

- A supervisor begins supervising an employee more closely and critically, because the employee participated in an investigation.

- Co-workers ostracize an employee because the employee filed a complaint against another coworker, excluding the employee from meetings and discussions.
- A supervisor makes critical comments about an employee to the employee's coworkers, because the employee requested FMLA leave.
- Disciplinary actions such as suspensions or termination—if such actions are taken because of the protected activity.
- Revoking telecommuting privileges or an alternate work schedule of an employee who had acted as witness in an investigation, because of the employee's participation.
- A supervisor hides or makes inaccessible files, tools, or equipment that an employee needs to do the job because the supervisor resents a disability accommodation provided to the employee.
- Trying through your own investigation actions to discover the identity of an anonymous whistleblower, if not disclosed to you during the investigation process.
- Student A is a Respondent in a complaint resolution process. Student A's advisor, who is in charge of hiring interns, is aware of the complaint and rescinds the internship offer that was extended to Student B, Student A's romantic partner.
- Student A kicks Student B out of their a cappella group because Student B served as a witness in a sexual violence investigation in which Student A was the complainant, and that did not result in Student A's preferred outcome.
- A faculty member gives a student a lower final grade than indicated by the student's graded work because the student filed a discrimination complaint against the faculty member.

Please note that some types of retaliation are governed by particular laws, regulations, or policies that use a narrower definition of retaliation. In particular, the Whistleblower Protection Policy is a special grievance procedure that is available only for certain types of retaliation.

What does it mean for adverse action to be “because of” protected activity? How do we know if something is retaliatory?

Retaliation is not necessarily motivated by a desire to punish or injure someone, and investigations into retaliation typically do not seek to prove that the respondent was “out to get” the complainant. For example, if Ryan reports that Andrew is harassing him and a supervisor transfers Ryan because the supervisor believes this would fix the situation, this may still constitute retaliation against Ryan, if the transfer would deter a reasonable person in Ryan's circumstances from reporting harassment. (The supervisor's intent would be relevant in deciding on discipline.)

Investigations are often necessary to figure out whether the adverse action was retaliatory, or whether it was taken for a legitimate, non-retaliatory reason. For example, is your supervisor

monitoring you more closely because you filed a complaint, or because you started showing up for work late? Were you kicked out of your a cappella group because you served as a witness in an investigation, or because you have been disrupting practice by showing up after drinking? A retaliation investigation might seek evidence relevant to determining whether an action was made because of protected activity, such as:

- Statements indicating that the action was taken because of the protected activity. *“No overtime for you after you pulled that stunt last year,” where the “stunt” was you filing a complaint or serving as a witness.*
- Evidence that the rule for which an employee or student was disciplined had not been enforced previously.
- Shifting or inconsistent explanations given for the adverse action. *If the “story” changes as to why something was done, that may indicate that the reasons given are a pretext for retaliation.*
- Timing. If a negative action is taken shortly after the protected activity occurred, that often creates a presumption of retaliation. *If, however, the person who took the adverse action was unaware of your protected activity, that usually means that it was not retaliation.*
- Whether the action was consistent with applicable policy and procedure. *If the adverse action is non-selection for a job and review shows that the recruitment and selection process for that job were conducted in compliance with applicable policies and procedures, that would be evidence against retaliation.*
- Other evidence of a legitimate, non-retaliatory reason for the action. *For example, if the adverse action was you being counseled for unprofessional conduct, and there are records of students—who were unaware of your protected activity—complaining about your conduct.*

Do retaliation protections mean I can’t be disciplined or get a negative performance evaluation?

No. Filing a complaint or participating in an investigation does not give you a free pass to engage in misconduct or to perform poorly. What retaliation protections mean is that if anything negative happens to you, it may be questioned and scrutinized to see whether it was retaliatory. If you believe you have been retaliated against, please contact the investigator, if an investigation is ongoing. Other reporting options exist; they vary depending on whether you are a student or employee and the type of retaliation that you experienced.

For further information, please visit the following websites:

<https://chancellor.berkeley.edu/faqs/retaliation-against-whistleblowers>

<https://ophd.berkeley.edu/submit-report-harassment-or-discrimination>

<https://hr.berkeley.edu/policies/policies-procedures/university/discrimination>