



**U.S. Department of Labor
Civil Rights Center**



*Civil
Rights
Center*

Protecting against retaliation
for participation
in protected activity

Overall concept of retaliation

- ⦿ According to the Supreme Court, “The very concept of retaliation is that the retaliating party takes action against the party retaliated against after, and because of, some action of the latter.”
- ⦿ “Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider making a complaint in the future.”

Regulatory requirements

- ◉ A recipient *may not* reject the application of, discharge from a program/activity/job, threaten, harass, coerce, intimidate or otherwise retaliate against an individual for engaging in “protected activity”
- ◉ A recipient *must* take appropriate steps to prevent retaliation

Elements of a Retaliation Claim

1. Engaging in a protected activity
 - a. opposing discrimination, or
 - b. engaging in discrimination complaint process (as a complainant or witness), or
 - c. engaging in any other protected activity (such as reasonable accommodation or religious accommodation processes)
2. Adverse Action
3. Causal connection between protected activity and adverse action

Opposing Discrimination: Definition

Opposing discrimination is explicitly or implicitly communicating to the covered entity a reasonable belief that its activity constituted unlawful discrimination under Federal nondiscrimination laws.

Opposing Discrimination: Examples

- ◉ filing a discrimination complaint or lawsuit
- ◉ communicating with a supervisor or manager of the covered entity about discrimination, including harassment
- ◉ refusing to follow orders that would result in discrimination
- ◉ resisting sexual advances, or intervening to protect others
- ◉ talking to managers or co-workers about salary information to uncover potentially discriminatory wages, provided the manner of opposition is reasonable

Opposing Discrimination: Specific example

Marybeth raises concerns to her supervisor about graffiti in her workplace that is derogatory toward women. Although Marybeth does not specify that she believes the graffiti creates a hostile work environment based on sex, or even file a formal complaint, her talking to her supervisor reasonably would have been interpreted as opposition to sex discrimination, due to the sex-based content of the graffiti. Her action therefore constitutes "opposition."

Opposing Discrimination: Key Points

- ◉ Discrimination *doesn't have to actually have taken place* in order for someone to be protected from retaliation!
 - As long as the person opposing discrimination has a *reasonable belief* that discrimination was taking place
- ◉ Person opposing discrimination *doesn't have to be the victim* of discrimination they oppose!
 - *E.g.*, men who oppose sexual harassment of women are protected

Engaging in Complaint Process: Definition

Did the Complainant alleging retaliation, or someone closely associated with the Complainant, file a discrimination complaint, or testify, assist, or participate in any manner in an investigation, proceeding, hearing, or lawsuit under Federal nondiscrimination law?

A Complainant is protected against retaliation for participating in complaint proceedings *even if* the original complaint:

- Was not valid or reasonable
- Involved a different covered entity

Engaging in other protected activity: Definition

A Complainant is additionally protected against retaliation for:

- ◉ seeking equally effective communications and/or reasonable accommodations / modifications for a disability
- ◉ seeking religious accommodations

Adverse Action: Definition

- ◉ An action that would deter a reasonable person from bringing or supporting a discrimination complaint
- ◉ Examples:
 - Denial of benefits and services
 - Negative evaluations
 - Threats, reprimands, harassment
 - Suspending, or limiting access to, complaint procedure
- ◉ More than “trivial harms, minor annoyances, or petty slights”

Adverse Action: Example

Harvey filed a complaint alleging that he was racially harassed by his supervisor and co-workers. After learning about the complaint, Harvey's supervisor asked two employees to keep Harvey under surveillance and report back about his activities.

Is this an adverse action?

Adverse Action: Example

Nora filed a complaint alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. Nora believed that the reason her supervisor excluded her was because of her complaint.

Is this an adverse action?

Causal Connection: the legal elements

- Direct evidence
 - Written or oral statements of intent to retaliate
- Inference of retaliation
 - The person who took the adverse action knew of the protected activity, and
 - The adverse action took place:
 - Shortly after the person learned of the protected activity, or
 - Within such a period of time that retaliatory intent may be inferred

If all the legal elements are present . . .

The elements we just went through are called a “prima facie case.”

In a formal investigation/legal analysis, *only if* all the elements of a prima facie case are present do we consider the covered entity’s explanation for the adverse action.

Considering Covered Entity's Explanation: Example

Sally alleges that Harry denied her a promotion because she opposed the under-representation of women in supervisory positions and was therefore viewed as a "troublemaker." The promotion went to another female employee. Harry asserts that the selectee was better qualified for the job because she had a Masters in Business Administration, while Sally only had a college degree. However, Sally has significantly greater experience working within the Agency and experience within the Agency has always been the most important criterion for selection for supervisory positions.

Considering Covered Entity's Explanation: Example

Jim is a jobseeker customer of a One-Stop Center. One of the Center employees, when working with customers (including Jim), regularly refers to them as "honey" or "sweetie." Jim finds the use of these terms offensive and files a complaint alleging that the Center employee has harassed him. Jim also regularly violates Center rules: for example, he enters employee-only areas without prior appointment or permission, loudly berates Center employees using profanity, refers to Center staff by insulting nicknames in e-mail correspondence, and fails to appear for scheduled appointments. A week after his complaint was filed, the Center informs Jim by letter that he is no longer welcome at its facilities.

Questions?

