



Retaliation: *The* form of 21st century employment discrimination

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Abstract During the past decade, retaliation as a basis for employment discrimination claims has risen dramatically from fourth to second place (behind race), increasing by 46%. By definition, retaliation is the act of an employer, through a manager, inflicting an adverse action (such as discharge, discipline, or demotion) against an employee who has complained of discrimination. Retaliation claims open the possibility of punitive damages, examples of which are given in this article. Drawing 1361 cases from a 21-year database, we report the characteristics of retaliation claims and offer recommendations to prevent and manage such claims.
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1. Employers beware

Retaliation is a form of employment discrimination, committed by a manager against an employee who has complained of one or more of the traditional forms of discrimination (e.g., race, sexual harassment, age). In itself, retaliation is not a free-standing traditional form; rather, it only occurs following a traditional complaint. During the past decade, retaliation has risen from the fourth to the second most frequently reported type of employment discrimination, following only race. Two reasons account for this increase, both

of which are important for employers to recognize. First, employers are susceptible to a charge of retaliation simply because an employee asserts it is so; that is, an employee does not need to prove an underlying basis (e.g., race, sexual harassment, age) to recover against their employer for retaliation. All they need to show is that they were retaliated against for reporting their original perception of discrimination. The second reason for the rise is that punitive damages are available in retaliation cases, making attorneys more willing to take these cases. For example, Joe Brown, a cook for Waffle House, was twice passed over for promotion in favor of white females. Within weeks of filing a race discrimination charge with the EEOC, he was terminated. The jury found for the employer on the underlying race claim, finding that race was not the reason for the promotion

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denials; however, it awarded Brown \$100,000 on the retaliatory termination for complaining, \$70,000 in compensatory damages for emotional pain and suffering, and punitive damages of \$250,000 (Womble Carlyle Sandridge & Rice, PLLC, 2005). Additional examples of retaliation recoveries include:

- A female Houston police officer complained that she was being sexually harassed by her supervisor; subsequently, her hours were changed to a substantially less desirable schedule. The jury awarded \$600,000 (Rice, 2005).
- After accusing her supervisor of sexual harassment, a county director was discharged. The jury awarded \$1.7 million (McKibben, 2005).
- Management did not address six years of sexual harassment against a female employee. Her supervisor limited her breaks, increased her workload, yelled at her, and tried to thwart additional reports of discrimination. The jury awarded \$1.4 million (including \$650,000 in punitive damages), to which the judge added \$174,927 in attorney fees (Baker v. Morrell & Co., 2004).
- After complaining of gender harassment, a female FedEx driver's truck brakes were sabotaged and help loading her truck was denied. As a result, \$3.2 million (including \$2.5 million in punitive damages) was awarded (EEOC v. Federal Express Corp., Jury Verdict 2/24/04).
- Laura Zubulake, a senior salesperson for UBS, proved both her underlying charge of gender discrimination (supervisor's belittling comments and withholding of important accounts) and the retaliatory action taken against her (being fired) for filing a discrimination charge with the EEOC. The jury awarded \$9.1 million in compensatory damages for the gender discrimination and \$20.2 million in punitive damages for the retaliation (Zubulake v. UBS Warburg LLC, 2005). Her lawyer said, "It is nice to see some recovery not just for gender discrimination but for retaliation. A lot of women feel that if they complain they will get fired, that they are history. I hope that this verdict will serve notice to companies that they can't do that" (Teather, 2005, p. 19).

2. The increase in retaliation claims

From 1994 through 2004, retaliation claims filed with the EEOC increased by 47% (U.S. Equal Employment Opportunity Commission, 2005). During the same period, retaliation claims increased in

our database (described in Section 4) by 46%, more than any other basis. In 2004, retaliation accounted for 23% of all claims (with race, 28%; sex, 17%; disability, 16%; age, 10%; national origin, 3%; religion, 2%; other, 1%). This dramatic rise to second place among claims filed is the basis of our assertion that retaliation is *the* form of employment discrimination for this new century.

3. What is retaliation?

The ancient definition of "retaliation," or *lex talionis*, is "an eye for an eye; a tooth for a tooth" (Black, 1968, p. 1058). Today, the interpretation is less literal. As applied to the workplace, Cortina and Magley (2003) identified two general types of retaliation by managers: (1) negative actions directed at the employee's job, such as demotion, termination, pay cut, poor evaluation, or denial of benefits; and (2) antisocial actions directed at the employee to demonstrate displeasure, such as "...harassment, name-calling, ostracism, blame, threats, or the 'silent treatment'" (p. 248).

3.1. The judicial view of retaliation

The U.S. Supreme Court has not delineated retaliatory actions for purposes of Title VII (United States Congress, 1964) or the other anti-discrimination statutes. Its most recent pronouncement regarding retaliation involved *Robinson v. Shell Oil Co.* (1997), in which the Court endorsed a broad application of the anti-retaliation provisions for the protection of employees who report good faith perceptions of discrimination. In *Robinson*, a former employee filed a charge of race discrimination following his discharge and the employer retaliated by giving a negative post-employment reference. A more conventional example of retaliation is illustrated by a 2005 U.S. Court of Appeals decision, which upheld a jury verdict for a female Hispanic police officer who was not promoted after filing an internal complaint of sex and national origin discrimination. The jury awarded her \$18,000 in back pay, \$282,000 in front pay, and \$250,000 (later reduced to \$175,000) in compensatory damages for mental and emotional suffering (Deloughery v. City of Chicago, 2005). The U.S. Supreme Court also recently agreed to hear an appeal in *Burlington Northern Santa Fe Railway Corp. v. White* (Bravin, 2005). By the end of 2006, it may more specifically delineate what are retaliatory actions.

Pending further definition by the U.S. Supreme Court, U.S. Circuit Courts have taken two different but essentially parallel paths. Initially, all consider

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