

Legal focus

EEOC Reports Retaliation Claims Surpass Race Discrimination Claims in 2010

Good employers do not practice discrimination and know how to avoid unfounded claims. However, many employers are not aware of a growing trend in retaliation claims filed by employees. For the first time ever, retaliation claims surpassed racial discrimination claims as the most common Equal Employment and Opportunity Commission (EEOC) charge. See, U.S. EEOC FY 2010 Performance and Accountability Report.

What is a Retaliation Claim?

An employee can claim retaliation by establishing three elements: (1) the employee engaged in an activity protected by law; (2) the employer took an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Mason v. Transportation Solutions, 2010 U.S. Dist. LEXIS 67416; Crownover v. Shriver Contract Services, 2008 U.S. Dist. LEXIS 3021; citing Krouse v. Amer. Sterilizer Co., 126 F.3d 494 (3d Cir. 1997). An employee can even present a claim where there is *no direct evidence* of retaliation and it is then up to the employer to *disprove* the allegations made by the employee. Fasold v. Justice, 409 F.3d 178, 188 (3d Cir. 2005).

In the Mason v. Transportation Solutions case the employee claimed

that (1) a memo she wrote to her employer complaining that her supervisor was treating her unfairly was “protected activity”; that (2) her subsequent termination by that supervisor was an “adverse employment action”; and (3) that this retaliation was “caused” by her having written the memo. The court refused to grant summary judgment to employer and decided that the matter would need to proceed to trial for resolution.

Why are Retaliation Claims Increasing?

Several factors contributed to the increase in retaliation claims and the growth of EEOC claims overall in 2010. Employees’ greater awareness of the law, current strained economic conditions and increased diversity in the workforce are considered to be key factors to the rise in claims. But no doubt, the fact that a charge of retaliation can be asserted under all antidiscrimination laws, accounts for the substantial growth of retaliation claims against employers in 2010. Further, the Supreme Court recognized a lower threshold standard for retaliation claims in the relatively recent case of Burlington Northern v. White, 548 U.S. 53 (2006). So when an EEOC investigator reviews a claim of age or race discrimination, they often concurrently evaluate the case for evi-

dence of retaliation. Of the 99,972 EEOC claims filed in 2010, 36% included a retaliation charge.

Retaliation claims are also not limited to alleged instances of discrimination by employers. In the case of Isler v. Keystone School District, 2008 U.S. Dist. LEXIS 65902, a school bus contractor sued the school district alleging that the school district’s failure to renew his contract was in retaliation for his advocacy on behalf of a disabled student. The federal court dismissed the contractor’s claims on summary judgment but noted that the contractor’s allegations under Pennsylvania’s Whistleblower Law, 43 P.S. §1421, et seq, could proceed in state court. The main point here is that retaliation claims are very broad and are not limited to actions filed by members of a protected class relating to alleged discrimination. For instance, allegations that an employer retaliated against an employee who raised safety issues addressed by various state and federal statutes (i.e., complaints about equipment, working conditions, etc.) are often raised by disgruntled employees after an adverse employment action.



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How Can Retaliation Claims be Avoided?

Terminating employment, demoting, refusing to give raises, reassignment of job duties, even refusal to hire could all be considered an “adverse employment action” that could be the basis of a retaliation claim. Many employers find themselves defending an EEOC claim or retaliation claim, not because of blatant discriminatory acts, but because they failed to document why an employee was being disciplined, demoted, terminated, or not hired. The laws are written so that it is the burden of the employer to disprove an employee’s claim of discrimination/retaliation. Hence, it is more likely that an employee will raise a claim of discrimination/retaliation when they know that no written documentation exists. Plaintiffs can also strategically seek damages under one statute at a time, resulting in expensive and time consuming defense costs for the employer.

Employers should be aware of the possibility of retaliation claims especially when administering discipline and/or changing an employee’s assignments. Many successful employee retaliation claims result when the employer does not engage in proper investigation, planning and documentation prior to taking action in a discipline or termination event. A few suggestions include:

1. Be sure Anti-harassment/retaliation policy is in place, communicated, and maintained as standard operating procedures.
2. Develop and communicate your complaint process with employees. Procedure should include a process that allows employees a venue outside the normal chain of command.
3. Educate your supervisors on the various laws and review the basics periodically.
4. Complete your due diligence when an event arises
 - a. Investigate, interview, listen before coming to a conclusion.
5. Consider having all requests to terminate employees reviewed by several members of your management team, this would eliminate front line supervisors overreacting in the heat of the moment.
 - a. Even if an employee’s actions are egregious: First suspend, investigate, and then terminate if warranted.
6. Document. Documentation should be timely, thorough and accurate. Employers should document the bona fide reason for taking action.
7. Be consistent in the application of your policies and procedures.
8. Follow the minimally necessary rule; engage only those in a need-to-know position in the process.
9. Consult with legal counsel before taking disciplinary actions.



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