

## Protected Workplace Activity: Avoiding and Defending Against Retaliation Claims

Brian D. Moore

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### Retaliation claims are on the rise...

- In 1997, retaliation claims accounted for just **22.6%** of all charges filed
- In 2021, retaliation claims accounted for **56%** of all charges filed

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### What is Retaliation?

- When an employer takes a materially adverse action against an employee to punish or deter them from engaging in "protected activity"

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## What is Protected Activity?

- Any activity that an employee or applicant may engage in without fear of negative repercussions from their employer

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## Examples of Legal Basis for Protected Activity

- Federal Laws:
  - ADA
  - ADEA
  - FMLA
  - FLSA
  - NLRA
  - Title VII
- OSHA
- State Laws:
  - NFEPA
  - Common Law
  - Public Policy, e.g. Workers' Compensation

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## Protected Exercise of Rights

- Employees are protected from repercussions from employers when they exercise rights granted to them under federal or state law
- Common examples:
  - Requesting accommodations of a disability or religious practice
  - Claiming entitlement to workers' compensation benefits
  - Utilizing FMLA leave

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## Protected Complaints

- Employees engage in protected activity when they raise complaints about or otherwise oppose unlawful employment practices
- Examples:
  - Opposing discrimination, harassment, or improper wage payments
  - Filing an EEOC Charge, an NLRB Charge, or DOL Wage Complaint

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## Protected Participation

- Employees are protected from retaliation when they participate in an internal or external process designed to investigate or correct violations of the law
- Examples:
  - EEOC Investigations
  - Appearing as a witness in a discrimination lawsuit
  - Participating in the employer's investigations

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## Protected Concerted Activity

- Employers covered under the National Labor Relations Act are prohibited from interfering with, restraining, or coercing employees in the exercise of rights related to organizing, forming, joining, or assisting a labor organization for collective bargaining purposes or to improve terms and conditions of employment.

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## Adverse Employment Actions

- Any tangible change in working conditions that would dissuade or deter a reasonable person from engaging in protected activity
- To be actionable as retaliation, an employee must show the adverse employment action is material, not trivial, and resulted in some concrete harm
- Adverse employment actions are not petty slights or minor annoyances

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## Examples of Retaliation

- Failure or refusal to hire
- Suspension, demotion, or disciplinary action
- Poor performance review
- Discharge/termination

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## Examples of Retaliation

- Verbal or physical abuse
- Spreading rumors
- Increased scrutiny
- Treating family members negatively
- Changing an employees' schedule to conflict with family responsibilities

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### Retaliation Before Protected Activity?

- Yes, retaliation can occur even before protected activity takes place
- Examples:
  - Employers' policies aimed to discourage employees from exercising their legal rights
  - Policies limiting employees' rights to invoke ADA protections
  - Policies with "no exception" leave policies

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### Retaliation After Employment?

- Yes, employees who engage in protected activity maintain their protections after their employment ends
- Retaliatory actions that connect to employment or encroach on future employment may be actionable
- Examples:
  - Refusal to rehire
  - Defaming or "blackballing"
  - Giving a negative reference

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### Can We Still Discipline Protected Employees?

- Yes! But proceed with caution.
- Protected employees are not shielded from legitimate discipline or discharge
- Protected employees are not entitled to special treatment

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## Defending a Retaliation Claim

- Elements of a Claim:
  - The *prima facie* case
    - (1) Employee engaged in protected activity
    - (2) Employer took adverse employment action against employee
    - (3) there is a causal connection between the two
  - The shifting burden
    - Does employer have a legitimate, non-retaliatory reason for adverse action?
  - Evidence of pretext

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## Avoiding Retaliation Claims

- Create anti-retaliation policies and an anti-retaliation culture
- Train supervisors and managers
- Apply policies consistently
- Take complaints seriously, investigate thoroughly
- Communicate adverse employment actions clearly and consistently

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## Questions?

Brian D. Moore  
402.636.8223

[bmoore@bairdholm.com](mailto:bmoore@bairdholm.com)

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