



**Employee-Related  
Retaliation –  
What it is and  
how to avoid it**

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In 2020, the Equal Employment Opportunity Commission (EEOC) reported that retaliation – or the act of punishing employees for engaging in a “protected activity” such as complaining about wrongdoing to themselves or others – was asserted in over 55% of all charges received and was the most frequently alleged basis of discrimination in EEOC cases.<sup>1</sup>

Businesses, therefore, need to understand the equal employment opportunity (EEO) laws, what is considered retaliation, and how to avoid retaliation charges by employees. This paper was designed to provide an overview of that information.

<sup>1</sup> Charges filed with EEOC FY 2011 – FY 2020



## What is Retaliation?

Federal and state EEO laws prohibit employers from discriminating against employees based on characteristics such as age or race.

**Those same EEO laws also prohibit employers from engaging in retaliation, or punishing employees for engaging in “protected activity” such as:**

- Complaining about discrimination in the workplace against oneself or others
- Rebuffing sexual advances
- Filing or being a witness in an EEO proceeding such as an internal complaint or grievance or an administrative charge or complaint filed with an agency or the courts
- Answering questions during an employer’s investigation into harassment or discrimination
- Requesting accommodation for a religious practice or disability
- Complaining about or refusing to engage in other violations of certain laws

## Let's take a look at an example through a fact pattern



Joe just celebrated his 60th birthday at XYZ Company.



One of his coworkers says, "Wow, I didn't realize you were that old, Joe!"



On a Zoom call that day, Joe has difficulty navigating the technology.



Joe's boss teases him, saying, "It must be because you're getting old, Joe. Technology isn't what it used to be."



Joe complains to HR about the comments about his age.



After that, Joe is no longer invited to certain Zoom meetings and projects in which he should have participated. When Joe inquires about why he is being excluded, his manager is evasive and does not state any clear reason.

Joe then files a charge of age discrimination and retaliation with the EEOC.



## To be viable, Joe’s retaliation complaint must include 3 elements

1

**The internal complaint must be about conduct prohibited by the EEO laws and the employee must reasonably believe the conduct violates those laws.**

Gripes about the workplace or general insults (“You are such a jerk.”) that don’t implicate EEO laws, are not protected. Joe’s believes his coworkers’ and manager’s behavior shows negative bias against him because of his age and violate EEO laws that prohibit age discrimination.

2

**The employee must show the employer took “adverse action” against them, such as a material change in the terms or conditions of their employment – a demotion, salary reduction, decreased work hours, or poor performance review.**

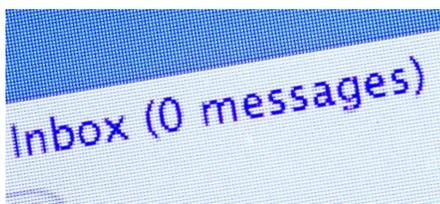
Even if well-intended, any action that would deter a reasonable employee in the same situation from complaining or participating in an investigation in the future may qualify as “adverse action.” For example, changing an employee’s sales territory to keep her from interacting with an alleged harasser may stop the wrongful conduct, but, if her original territory was more lucrative, changing it in response to a complaint may be deemed retaliatory.

Joe was no longer invited to Zoom meetings and was not asked to participate in projects that involved interaction with technology, resulting in less exposure to senior management and decreased career advancement opportunities.

3

**The employee must show that the protected activity caused or motivated the adverse action by the employer.**

Once an employee engages in protected activity, such as a complaint or investigation, that does not forever cloak them in immunity from all discipline or changes in employment conditions. An employer can discipline or even discharge an employee if they can show that they had nonretaliatory reasons for taking that action. But “timing is everything” in retaliation claims. Even seemingly innocuous changes in employment conditions made shortly after the employee complains about discrimination may create a legal liability for a retaliation charge.



**The invitations to Zoom meetings and project opportunities stopped within a week after Joe complained about the comments and harassment about his age.**

When asked, his coworkers and managers couldn’t articulate a clear reason for their new behavior, which creates an inference that it was due to Joe’s complaints.

## More examples to think about

*Here are a couple more retaliation claims scenarios to consider.*

### **Sexual harassment redirect causes defensibility issues**

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Jacob, a managing director at ABC Company, was placed on administrative leave while the company investigated complaints from several female employees of sexual harassment and discriminatory treatment. In response, Jacob contended the investigation and administrative leave were punishment and in retaliation for his terminating a consensual relationship with Julia, his co-managing director, several years ago. The rest of ABC Company had no knowledge of this relationship. Jacob further asserted that Julia sexually harassed him after he terminated their consensual relationship. Defense counsel's investigation showed that Julia was highly emotional and instigated the other female employees' complaint about Jacob and the initial harassment investigation, casting doubt on whether there was a legitimate business reason for investigating Jacob and placing him on administrative leave.

Because of issues with the defensibility of this claim, ABC settled the claim and Jacob received a seven-figure settlement.

### **Retaliation for making a racial harassment complaint**

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John, an African American employee, complained to his manager that he kept finding racial epithets and cartoons on and in his locker. The company investigated but no culprit was found. The behavior continued, and John continued to complain. His exasperated manager told him to "let it go" and then changed John's schedule "because John could not get along with his team." John's new schedule didn't allow him to work overtime hours and conflicted with his wife's job, but his manager refused to reinstate his original schedule, telling John it was for his "own good."

After John was switched to a new team, he was no longer racially harassed. However, he was able to win a sizable settlement, in part, because his manager didn't take action and put him off when he complained that his new position was retaliatory.



## Tips to Prevent Retaliation

- Post your company's internal complaint procedures in a public place, where everyone can access them. It must be made clear that the company will not retaliate against anyone who complains of workplace issues or participates in an investigation of workplace complaints.
- Make sure all managers and human resources staff understand what retaliation is and are trained on how to avoid engaging in it.
- If changes are made to the terms and conditions of an employee's employment, make sure that the company has legitimate, well-documented business reasons.

### **For insurance to protect your company, you must report the underlying complaint.**

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Employers must comply with the reporting requirements in their EPLI policy and report written demands and EEOC charges (not just lawsuits) alleging discrimination in a timely fashion. If those types of discrimination complaints are not reported to the insurance carrier in a timely manner, coverage for a subsequent retaliation claim also may be denied due to late notice.

**To learn more please contact your Agent, Broker, or Chubb Underwriter.**

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The claim scenarios described here are intended to show the types of situations that may result in claims. These scenarios should not be compared to any other claim. Whether or to what extent a particular loss is covered depends on the facts and circumstances of the loss, the terms and conditions of the policy as issued and applicable law. Facts may have been changed to protect privacy of the parties involved.