

EMPLOYEE RETALIATION CLAIMS: YOUR WORST NIGHTMARE

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I. Nature of Retaliation Claims

A. **What is employer retaliation?** A manager may not fire, demote, harass, discipline, take adverse action against or otherwise "retaliate" against an employee where the reason for the adverse action was the employee's exercise of a right conferred by a well-established legislative enactment.

1. Adverse action against an employee after they engage in any of the following activities can be a form of unlawful retaliation:

- a. Exercising a right guaranteed by law:
- b. Refusing to participate in unlawful activity requested by employer.
- c. Executing a duty required by law or acting in accordance with a statutory duty.

B. **Why protect employees against retaliation?** If retaliation for such activities were permitted, it would have a chilling effect upon the willingness of individuals to speak out unlawful employment practices.

C. **Michigan Statutory Protections:**

1. General Whistleblower Protection: An employee may not be discharged (or discriminated against) in retaliation for reporting a suspected violation of a law (federal, state, or local), or for participating in an investigation, hearing, inquiry, or court action.

- a. The report may be made verbally or in writing, but it must be made to a public body (such as a state officer, state agency, school board, law enforcement agency, and member of the judiciary).
 - b. An employee who discloses wrongdoing to a supervisor is not protected.
 - c. An employee is not protected if she knows that the report is false.
2. Discrimination & Civil Rights: An employee may not be retaliated against (or discriminated against) for opposing a violation of Michigan's Elliott-Larsen Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that statute.
3. Health Care Workers: A healthcare worker may not be retaliated against for reporting an unsafe healthcare practice or condition in a healthcare facility.
4. Occupational Safety and Health: Several activities concerning occupational safety and health are protected:
 - a. An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, testifying at a proceeding, or exercising a right concerning occupational safety and health.
 - b. An employee may not be penalized (or discriminated against) in retaliation for refusing to operate equipment or engage in a process that is "tagged" as presenting an imminent danger by a Department of Labor representative.

- c. An employee may not be penalized (or discriminated against) in retaliation for participating in an inspection, investigation, or conference concerning occupational safety and health laws.
 - 5. Minimum Wage Laws: An employee may not be discharged (or discriminated against) in retaliation for testifying before the wage deviation board or for serving on the wage deviation board. The wage deviation board enforces the state's minimum wages laws. An employer who violates this provision is guilty of a misdemeanor.
 - 6. Payment of Wages and Fringe Benefits: An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, testifying in a proceeding, or exercising a right concerning payment of wages and fringe benefits.
 - 7. Persons with Disabilities Civil Rights Act: An employee may not be retaliated against (or discriminated against) for opposing a violation of the Persons With Disabilities Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that same statute.
- D. **Specific acts which are protected:** Employees are protected against adverse action in response to any of the following activities:
- 1. Refusal to violate the law when requested by employer.
 - 2. Opposing discriminatory conduct against themselves or another employee.
 - 3. Testified, assisted or participated in an investigation or proceeding regarding discrimination.

4. Filing a discrimination complaint.
5. Filing a sexual harassment complaint.
6. Uncovering and reporting fraud in accounting or corporate practices.
7. Filing a worker's compensation claim and/or collecting workers compensation benefits.
8. Exercising rights under FMLA.

E. **Employee's Rights:** Along with protection against retaliation, employees have the right to the following conduct without discrimination, or adverse action:

1. Circumspectly gather evidence to prove a suspected violation
2. Ask to meet with management to discuss a violation
3. Complaint to anyone about a violation or suspected violation, including other employees
4. Advocate for improved representation for covered classes in a union setting
5. Participate in public demonstrations about violations in the industry
6. Advise co-workers of worker's rights
7. Form a one-person picket to protest violations

F. **Employer's rights:** The following actions do not give right to retaliation claims:

1. Discharge employees for poor job performance

2. Discipline or discharge employees for continually violating established rules, or for an accumulation of incidents
3. Question witnesses regarding alleged violations
4. Discharge employees for criminal acts of protest (arson, blocking traffic, vandalism)
5. Discharge employees whose lawful actions are excessively hostile (constant, disloyal complaints which cause subordinates to quit or which jeopardize the employer's mission)
6. Refuse to meet with activists organizing for civil rights (but do not discipline employees for requesting a meeting)
7. Bottom line: Employers are entitled to take appropriate disciplinary action against an employee for legitimate reasons even if that employee has complained of or reported a violation. The discipline must not result from the complaint. Both employees and supervisors must use care and prudence when dealing with these situations.

G. Why are retaliation claims an employer's worst nightmare?

1. Employees can bring a claim for retaliation against their employer while remaining employed – presents less risk of lost earnings to an employee
2. Jury verdict research indicates there is a 57% chance of an employee receiving a favorable jury verdict in a retaliation claim
3. Due to the inherent names of retaliation claims, juries tend to return substantial awards, and often punitive damages.

II. Requirements of Retaliation Claim

- A. Employee engaged in protected activity.
- B. Employee is subject to adverse action:
 - 1. Demotion, harassment, or termination.
 - 2. Subject to treatment that would cause a reasonable person to be less likely to complain about discrimination as a result.
 - 3. Employee subject to different treatment than other employees.
 - 4. Treatment of employee changed after protected activity.
- C. The employer or decision maker knew about the protected activity
- D. Employee has evidence of a causal connection between the protected activity and the adverse employment action taken against them
 - 1. Common factors: temporal proximity, examples of other employees subject to adverse action for similar activities, written policies, reports, etc.

III. Burden of Proof in Retaliation Claim

- A. It is the employee's responsibility to prove that the employer was aware of the employee's participation or opposition, and that the employee was treated adversely because of it.
- B. The employer must give reasons for such treatment, and that employee must prove that these reasons were a pretense.
- C. The motives of both employer and employee, and the extent of damage resulting from the employee's activities, are all crucial factors.

IV. Retaliation for Employee's Use of Social Media: Employers must use caution when taking adverse employee action due to posting and social media use - posts can be used for evidence against the employer.

A. Comments lamenting that a "f*cking indian" was made department chair and other racist Facebook posts by two professors who were allowed to vote on an employee's tenure (which was denied). The employee's retaliation claim also advanced, partly because the Facebook posts provided a causal link between the denial of tenure and his prior complaints of race discrimination (Hannah v. Northeastern State University).

B. A court found a triable issue on whether a male EMT was fired in retaliation for reporting sexual harassment by a male coworker or because he refused to sign a letter agreeing to attend anger management after he wrote Facebook posts (the same day the coworker touched him near his crotch) threatening "the mother f***er who thought today was a joke" and stating he would "knock [that individual's] f***ing teeth out, break [his or her] jaw [and] every bone in [his or her] left arm." The employee claimed he told HR he was willing to do the training but refused to sign the letter because it purported to exonerate the company for the harassment (Verga v. Emergency Ambulance Service, Inc.).

C. Evidence that an employer suspended, fired, and then sued an employee for defamation because she spoke to the media, was featured on Facebook by the media, and complained to OSHA about workplace exposure to chemicals linked to breathing problems suggested to a federal court that the Secretary of Labor was likely to succeed on a retaliation claim filed on the employee's behalf under the OSH Act. The court enjoined the employer from taking adverse actions against employees who exercise rights under the Act (Perez v. Lear Corporation Eeds and Interiors).

V. How to Prevent Charges of Retaliation

A. Educate Supervisors and Decision Makers about the following:

1. Things to do:

- a. Maintain confidentiality in all aspects of the discriminatory harassment complaint process.
- b. Make sure there is substantiated evidence to justify treatment of employees.
- c. Review work rules and policies – a seemingly neutral policy may affect employees adversely
 - i. Example: Employees should not be required to obtain permission from employer to cooperate or participate in governmental investigations of discrimination; nonsupervisory workers should be permitted to talk to attorneys seeking evidence for discrimination claims.

2. Things to avoid:

- a. Tell other workers to “keep an eye” on an employee after engagement in protected activity.
- b. Keep attendance records differently on the employee than for other employees.
- c. Accelerate disciplinary actions or dispense unusually harsh discipline on the employee.
- d. Increase criticism of employee’s work unless there is a substantial reason.

- e. Treat employee adversely because of spouse' or friend's protected activity.
- f. Discharge employees for refusing to testify in supervisor's favor during investigations.
- g. Discharge employees based on evidence obtained during retaliatory surveillance.
- h. Tell applicants not to call a department official to report a violation.
- i. Refuse to hire applicants on pretext, when the real reason was due to their history of reporting violations against a former employer.
- j. Avoid reactive behavior such as denying the employee information/equipment/benefits provided to others.

B. Employer protection through Handbook Provisions:

- 1. Policy against retaliation.
- 2. Open door policy requiring all complaints or grievances be brought to management's attention.
- 3. Provide access to outside counsel for opportunity to voice grievances if employee is uncomfortable talking to management.
- 4. Claim limitations which require employees to bring all claims relating to their employment within 180 days of the occurrence giving rise to the claim and limit claims to be brought in employee's individual capacity, as opposed to a class.