

WORKPLACE RETALIATION

By Breanne N. Gilliam, Esq.

I. DEFINING PROTECTED ACTIVITY THAT RETALIATION COVERS

A. What is retaliation?

1. Retaliation happens when an employer takes adverse action against an employee because they engaged in a protected activity or threatens to report a violation, like reporting discrimination, harassment, or safety concerns, essentially punishing them for exercising their right to speak up against wrongdoing within the company.
 - a. Just needs to be a “good faith” belief that the activity is protected, even if the alleged behavior is not unlawful or protected.
2. Elements of a retaliation claim:
 - a. Protected Activity: participation or opposition
 - i. Participation is when an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing
 - ii. Opposition is when an individual is opposing any practice made unlawful under the employment discrimination statutes. Opposition may be based on reasonable good faith belief, even if conduct opposed is ultimately deemed unlawful
 - b. Adverse Action: any action that might deter a reasonable person from engaging in protected activity (note: not just limited to actions that affect the terms and conditions of employment)
 - i. Discipline
 - ii. Demotion
 - iii. Threatening transfer
 - iv. Intentionally giving lower performance evaluations,
 - v. Threatening to call police authorities on employee,
 - vi. Termination
 - c. Causal Connection

- i. Direct evidence
 - ii. Circumstantial evidence: temporal proximity, inconsistent explanations, disparate treatment, inconsistent application of policies, patterns of unequal treatment, etc.
 - d. Burden Shifting
 - i. If protected activity, adverse action, and causal connection are all established, the burden shifts to the employer to show a legitimate nondiscriminatory reason for the action.
 - ii. If the employer shows a legitimate, nondiscriminatory reason, the burden shifts back to the employee to show that the employer's proffered reason is pretext.

II. THIRD PARTY RETALIATION

- A. Title VII's anti-retaliation provision extends to third parties. The person claiming retaliation does not need to be the person who engaged in opposition.

III. DAMAGES AWARDED FROM RETALIATION

- A. Front Pay,
- B. Back Pay,
- C. Attorney Fees,
- D. Reinstatement of employment,
- E. Punitive damages

IV. BEST PRACTICES

- A. Implement clear anti-retaliation policies
- B. Training
- C. Prompt and thorough investigations
- D. Consistent application of policies
- E. Document performance and other workplace issues