

# Breakfast Bites<sup>®</sup>



“DON'T GO AWAY MAD, GIRL, JUST GO AWAY.”  
— MÖTLEY CRÜE

## WORKPLACE RETALIATION

Breanne N. Gilliam, Esq.

 **Maddin Hauser**  
Attorneys and Counselors

**Maddin, Hauser, Roth & Heller, P.C.**

One Towne Square, Fifth Floor, Southfield, MI 48076  
p (248) 354-4030 f (248) 354-1422 maddinhauser.com





## Breanne N. Gilliam, Esq.

Associate

(248) 359-6326

(248) 359-6126 Fax

[bgilliam@maddinhauser.com](mailto:bgilliam@maddinhauser.com)



**Maddin Hauser**  
Attorneys and Counselors

**Maddin, Hauser, Roth & Heller, P.C.**

One Towne Square, Fifth Floor, Southfield, MI 48076

p (248) 354-4030 f (248) 354-1422 [maddinhauser.com](http://maddinhauser.com)



## Overview

---

- Retaliation – what it is and how to do it successfully.
  - What if it wasn't retaliation, the employee had performance issues?
- We've disciplined, ostracized and fired the employee. What is the worst that could happen?
- Actions your organization can take to protect itself from retaliation claims.

# RETALIATION - WHAT IS IT?

**Retaliation** happens when an employer takes adverse action against an employee because they engaged or threatened to engage in a **protected activity**, like reporting discrimination, harassment, or safety concerns, essentially punishing them for exercising their right to speak up against wrongdoing within the company.

# WHY IT MATTERS?

Retaliation claims are the most frequently alleged basis of discrimination filed with the EEOC

	2022	2023	2024
Total EEOC Charges Filed	73,485	81,055	88,531
<b>Retaliation</b>	<b>37,898</b>	<b>46,047</b>	<b>42,301</b>
Disability	25,004	29,160	33,668
Race	20,992	27,505	30,270
Sex	19,805	25,473	26,872
Age	11,500	14,144	16,223

Source: <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0>

# LEGAL FRAMEWORK: ELEMENTS OF A RETALIATION CLAIM

1. Protected Activity
2. Adverse Action
3. Causal Connection



# PROTECTED ACTIVITY

## *Employee engaged in an activity protected by law*

1. Participation: unlawful to retaliate because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing
2. Opposition: unlawful to retaliate against an individual for opposing any practice made unlawful under the employment discrimination statutes.

# PROTECTED ACTIVITY EXAMPLE 1

An employee complains to her office manager that her supervisor failed to promote her because of her sex after an apparently less qualified male was selected.

## PROTECTED ACTIVITY EXAMPLE 2

Same as Example 1, except the job sought by the employee was in accounting and it required a CPA license, which she lacked and the selectee had. She knew that it was necessary to have a CPA license to perform this job.



# ADVERSE ACTION

**Action that would dissuade a reasonable worker from engaging in protected activity**

- Termination
- Demotion
- Significant change in job duties
- Change in work schedule to an undesirable time

# ADVERSE ACTION

For retaliation claims, adverse action is not just limited to actions that affect the terms and conditions of employment—it protects individuals from any retaliation that produces an injury or harm.

*Burlington Northern & Santa Fe Railway Co. v. White* (U.S. Supreme Court 2006)

# CIRCUMSTANTIAL EVIDENCE

Temporal proximity- the timing between the protected activity and the adverse action

- Intervening events- *Kelley vs. OCS* (Western District of Michigan, May 2025)
  - “Because [protected activity] occurred more than six months before the alleged adverse actions, it cannot support an inference of retaliation without other evidence.”
  - “[A]n intervening event that provides a legitimate reason for adverse employment action dispels an inference of retaliation based on temporal proximity.”

# CIRCUMSTANTIAL EVIDENCE

- Inconsistent explanations
- Disparate treatment
- Inconsistent application of policies/practices
- Patterns of unequal treatment

# CIRCUMSTANTIAL EVIDENCE

Jane, a saleswoman, has been employed at a retail store for more than a decade, and has always exceeded her sales quota and received excellent performance appraisals. Shortly after the company learned that Jane had provided a witness statement to the EEOC in support of a coworker's sexual harassment claim, it terminated Jane, citing her failure to provide 48-hours advance notice to her supervisor about a shift swap with a coworker. She alleges retaliatory termination, and evidence reveals that same-day notice of shift swap was a widespread company practice that had commonly been permitted.

# THIRD-PARTY RETALIATION CLAIMS

*Burlington Northern & Santa Fe Railway Co. v. White* (U.S. Supreme Court 2006)

- Title VII's anti-retaliation provision extends to third parties
- “We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”

# ELEMENTS OF A RETALIATION CLAIM

1. **Protected Activity**
2. **Adverse Action**
3. **Causal Connection**
4. **Burden shifts to Employer to show legitimate, nondiscriminatory reason**
5. **Burden shifts back to Employee to show pretext**



# PRETEXT

Susan alleges that she was denied a promotion because she opposed a discriminatory employment action and was therefore viewed as a "troublemaker." The employer asserts that the selectee was better qualified for the job because she has a master's degree, whereas Susan only has a bachelor's degree. If Susan has significantly greater experience working at this company, and experience has long been the company's most important criterion for selecting managers, this explanation may be found to be a pretext for retaliation.



# WHAT IS THE WORST THAT COULD HAPPEN?

Employee can/will be awarded:  
Front pay, back pay, attorney  
fees and emotional distress.



# PRACTICAL TIPS

- Implement clear anti-retaliation policies
- Management training
- Conduct prompt and thorough investigations
- Consistent application of policies
- **DOCUMENT! DOCUMENT! DOCUMENT!**

# THE REAL-WORLD PROBLEMS

When employee is out on leave, employee performance issues may become evident.

- Normally, cause for PIP or discipline,
- Unable to discipline or address performance issues due to employee being out on leave.

If employee is not terminated/disciplined for leave, but for performance, that is not retaliation.



# REAL WORLD

**Scenario 1** = Employee is out on FMLA. Work product left evidence of significant performance issues.

**Scenario 2** = Employee out on FMLA. While out, find out employee had others punch in/out for him, engaging in fraud.

**Scenario 3** = Employee is on PIP/last chance. Performance is getting worse. You meet with employee to terminate. Next day, you receive a MIOSHA notice that employee filed a report two days ago.

# WHERE DISCIPLINE IS NOT RELATED

Document performance problems, even where performance problems show up while employee is on leave.

Make sure the performance problems are not related to disability or other protected status.



*Breakfast* **Bites**<sup>®</sup>

# QUESTIONS

 **Maddin Hauser**  
Attorneys and Counselors

**Maddin, Hauser, Roth & Heller, P.C.**

One Towne Square, Fifth Floor, Southfield, MI 48076  
p (248) 354-4030 f (248) 354-1422 maddinhauser.com



*Breakfast* **Bites**<sup>®</sup>

**THANK YOU**



**Breanne N. Gilliam, Esq.**

Associate

(248) 359-6326

(248) 359-6126 Fax

[bgilliam@maddinhauser.com](mailto:bgilliam@maddinhauser.com)



**Maddin Hauser**

Attorneys and Counselors

**Maddin, Hauser, Roth & Heller, P.C.**

One Towne Square, Fifth Floor, Southfield, MI 48076

p (248) 354-4030 f (248) 354-1422 [maddinhauser.com](http://maddinhauser.com)

