

EEOC Enforcement

Employee Retaliation Complaints Surging

THE U.S. Equal Employment Opportunity Commission is seeing a wave of retaliation complaints by employees. Retaliation charges accounted for more than 35% of all charges filed with the commission in fiscal year 2022.

Retaliation means any adverse action that you or someone who works for you takes against an employee because they complained about harassment or discrimination. Any negative action that would deter a reasonable worker in the same situation from making a complaint qualifies as retaliation.

Employees who participate in an investigation of any of these problems are also protected. For example, you cannot punish an employee for giving a statement to a government agency that is looking into a discrimination claim.

Employment law attorneys say that the increase is in part because employees who sue for retaliation have a higher degree of success than those who bring a regular discrimination charge. It's important that all employers train their managers and supervisors to not retaliate against workers making complaints, as the result can be a costly lawsuit.

Thanks to a precedent-setting case, *Burlington Northern & Santa Fe Railroad*

vs. *White*, while an employee alleging discrimination must prove that they suffered a "materially adverse employment action," a retaliation plaintiff only needs to show that the employer undertook some action that may dissuade them from making or supporting a charge.

Employment law experts recommend that employers do the following:

Set Clear, Unambiguous Policies

- Your company policy should clearly state that retaliation is not permitted.
- The policy should describe the parameters of inappropriate conduct as well as you can define them.
- Put the policy in writing.
- Set reporting and grievance procedures, including the person to whom the employee can report a retaliation complaint.
- Have staff sign an acknowledgment of receipt of your policy.

Investigate complaints promptly

Remember that anyone who participates in an investigation is likely protected from retaliation (including the employee who makes a complaint and witnesses).

Communicate the results of the investigation to the grievant.

Take effective remedial measures, including carefully reviewing all disciplinary measures before imposing them. You should also ensure that disciplinary actions are consistent with past practices.

Train managers and supervisors

Finally, you should train managers and supervisors and ensure they understand your policies.

Make sure they understand who is protected from retaliation (participants, complainants, and even persons related to the complainant in some cases).

They should also understand what constitutes retaliatory conduct and, if they are unsure, they should speak to your human resources manager. ❖