

# Employment Retaliation

## *A Spin-off of Discrimination and Harassment*



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Employment retaliation is a legal concept associated with illegal workplace discrimination. Retaliation is a deliberate adverse employment action taken by management (or its agent or a union) against an employee for complaining to others of discrimination or harassment – or, in the case of the Americans with Disabilities Act, of complaining of discrimination against them or some other employee. The Equal Employment Opportunity Commission (EEOC) treats retaliation as a violation of civil rights. According to the EEOC “an employer may not fire, demote, harass or otherwise ‘retaliate’ against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.”

William Gallagher Associates, a leading provider of insurance brokerage, risk management and employee benefits services to firms with complex risks, within industries that include high technology, life sciences, financial risks, healthcare services, energy, and environmental services. WGA has offices in Boston, MA; New York, NY; Hartford, CT; Princeton, NJ; Columbia, MD; Atlanta, GA; and Paris, France.

Retaliation can also take the form of a refusal to hire, salary reduction, inappropriate or discriminatory assignment, increase in personal surveillance, assault, termination, or denial of perquisites or equal opportunity – such as advancement or the prospect of working from home. The refusal by an employer to provide a reasonable accommodation following an employee complaint related to certain civil rights is also a form of retaliation. However, whistleblowers who bring up ethical, financial, or other non-discriminatory issues are not protected by EEOC enforced laws, but they may be protected by other federal and state statutes.

### **What is Employment Retaliation?**

Retaliation –some would call it revenge – is an activity that should not happen in a civilized society. While it is difficult to eradicate discrimination and harassment because humans may be hard-wired or predisposed to dislike people who are not very like themselves, retaliation by management should be controllable. Managers know, or should know, that discrimination, harassment, and retaliation are illegal and financially problematical. Nevertheless, acts of retaliation are common. In fiscal year 2007, the EEOC received 82,792 discrimination complaints, many with multiple charges, including 26,663 charges of retaliation. Why does this continue? There can be several explanations.

- Those who commit acts of retaliation are so personally and emotionally involved that they override any urges to avoid the consequences that they know will inevitably follow such acts.
- They want to discourage others from challenging authority, or complaining to upper management or to state or federal watchdog agencies.
- They think they won't get caught or sued.
- They are taking employment action because they sincerely believe the complainant has voiced a false statement or filed a false report.

In many cases, it is the EEOC or the courts that have to decide whether any of the underlying events occurred, whether an adverse employment action took place, and if it did, whether it was an act of retaliation. For example, in December, 2003, Caremark Rx announced that it would outsource hundreds of jobs in its Texas facility to IBM in India. Shortly thereafter, many employees of the facility began to harass and discriminate against a co-worker, Neelima Tirumalasetti, a U.S. citizen born in India. The more she tried to stop the abuse, the worse it got. She reported the discrimination to her managers, company vice presidents, and to human resources, to no avail she said. She then filed a complaint with the EEOC. She alleged that Caremark employees made her life miserable, that co-workers claimed that people such as her were taking away their jobs. She stated that she had received several death threats, including one from her supervisor.

She alleged that, following her complaints, Caremark diminished her responsibilities, denied her pay, and accused her of lying. Eventually Tirumalasetti, an information technology analyst in quality assurance, was hospitalized several times. She alleged that the company excused the behavior of its employees – after all, it was understandable that employees were upset about the prospective loss of their jobs to outsourcing. Shortly after Tirumalasetti filed a complaint with the EEOC, Caremark terminated her employment.

On September 16, 2005, Tirumalasetti sued Caremark Rx in the federal district court for Northern Texas (*Case No. 3:2005cv01847*) for job discrimination, harassment, and retaliation, all based on race. Both parties demanded a jury trial. Her case became a *cause celebre* – the kind of case no defendant corporation wants to see in the public media or trade journals. Bad publicity is a potential consequence of adverse employment actions, regardless of the ultimate outcome of the lawsuit. On April 23, 2007, a district court jury found for the defendant. Following the verdict, Tirumalasetti announced plans to appeal the decision to the Fifth Circuit Court of Appeals. Although the plaintiff lost her lawsuit, the defendant's reputation has been irretrievably tarnished. This story is on many Internet websites and has been reported extensively by the domestic and foreign press.

Until 2006 only a few appeals courts took an expansive view of what constitutes retaliatory action. That changed when the U.S. Supreme Court, on June 22, 2006, adopted a broad interpretation of retaliation in *Burlington Northern and Santa Fe Railway v. White*. In that case, the Court opined that retaliation could be any action that deterred a reasonable person from pursuing or engaging in protected rights, such as participating in protests or in actions under Title VII of the Civil Rights Act of 1964.

One of the consequences of this broad interpretation is that it is no longer necessary for actual discrimination to have occurred in order for a claim of retaliatory action to be pressed against a defendant employer. A jury may find that an employee – who thought or had reason to believe that he or she was being discriminated against and who consequently filed a complaint based on that belief – has sufficient grounds to seek judicial relief if the employer engages in a retaliatory action as a result of a complaint even if the complaint is only based on perceived discrimination.

The decision in *White* may favor *Tirumalasetti* in any appeal she may file. However, some courts have rejected employee claims of retaliation when the employee's actions have been unprofessional or petty. That defense, however, is difficult for an employer and may hinge on how thoroughly the employer conducted its investigation of the complaints and on its supporting non-discriminatory job action documentation.

There are more than 30 federal laws that protect persons from retaliatory actions by employers. These include safety and health, environmental, securities, waste or fraud in government, unfair labor practices, and protected leaves of absence statutes. In some cases, state statutes or common law may provide more protection than federal law. Examples would include an employee refusing to engage in an illegal or unsafe work activity, serving in the military or on a jury, making a workers' compensation claim, protesting illegal discrimination, and whistle blowing. Retaliatory protection is extended to current and former employees and to prospective employees, and would include illegal actions by an employer that serve to restrict an employee's ability to gain employment with another employer.

### **Costs**

Guilty or not, there are many costs for companies that engage in, allow their employees or agents to engage in, or are falsely accused of discrimination, harassment, or retaliation. There are direct costs associated with trials or out-of-court settlements, including the costs of defending against lawsuits. There are indirect costs associated with investigation, public press releases, employee morale, and public reputation. And there are the costs associated with marketing the company to insurance companies because the company's claims history is a major underwriting consideration.

### **Judicial Consequences**

It is commonly understood that the employer may be subject to government or civil action if the employer engages in discrimination or retaliation. What is less realized is that individuals may also face judicial action. Although the Civil Rights Act does not give rights to an employee to file suit against individuals, the Americans with Disabilities Act does. So do various state statutes, including the laws of California. Non-employers may also be sued for aiding and abetting discrimination under certain circumstances, including vendors, customers, or agents of the employer – recruitment firms, for example. Such persons may be held personally liable for their actions.

### **Insurance Coverage**

Many employers provide themselves with some protection against the potentially significant defense and settlement costs of employee lawsuits by purchasing a stand-alone/separate Employment Practices Liability (EPL) insurance policy. Others buy the insurance as part of a Directors' & Officers Liability policy (D&O). The latter approach requires careful analysis of whether the policy covers all employees, and the company itself (so called "Side C" coverage).

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If your company's D&O policy covers all employees and has entity coverage, endorsing the policy to provide EPL coverage may be a viable alternative to an EPL policy. The endorsement would have to be sufficiently broad as to capture all the coverage and limits available under stand-alone EPL policies. Consult your insurance broker who can help you with various alternatives and policy comparisons.

