



## Retaliation – The Cause (of action) Célèbre

Retaliation is without a doubt the favored tool in the plaintiff attorney's kit bag. Retaliation claims increased 41% from 1996 to 2002. In 2005, out of 75,000+ charges received by the Equal Employment Opportunity Commission (EEOC), nearly a third included a retaliation allegation.

Why are retaliation claims so popular? They are relatively easy to allege since virtually any negative comment or eventuality can be characterized as retaliatory. Retaliation can be alleged even when the employer is not guilty of underlying wrongdoing. An employee can claim to have been the victim of retaliation without necessarily having been the subject of employer discrimination or harassment (for instance, by claiming to have supported, or even to have been related to, the alleged victim). And even in well-intentioned organizations, there is a tendency to ostracize someone who is seen as making trouble.

Some (but by no means all) of the laws which forbid retaliation are:

- State and federal wage and hour laws
- Workers' compensation and state and federal occupational health/safety laws
- State and federal laws regarding discrimination and harassment
- USERRA (protecting people who serve in the uniformed services)
- FMLA (the federal Family and Medical Leave Act)
- The National Labor Relations Act (NLRA)

Even where statutes do not expressly forbid retaliation, courts are increasingly willing to find protection from retaliation to be implied in many employment-related laws.

The essence of a retaliation claim is that someone allegedly suffered a negative consequence for exercising legal rights or engaging in protected behaviors. Some of the activities most commonly cited in retaliation claims are testifying in another employee's case or complaint, complaining to a government agency or cooperating in a government investigation, refusing to participate in an illegal act, and objecting to an employer's illegal activities (some courts would say that even if the employee wrongly believed the employer to be acting illegally, as long as the belief was reasonable the employee is protected).

The risk of a retaliation claim is elevated when an employee remains employed after complaining (it should go without saying that firing someone soon after a complaint is made will draw a retaliation allegation). This was taken to an extreme in a recent case where an employee sued saying his employer retaliated against him by giving him undeserved good evaluations in retaliation for having filed a complaint, thus depriving the employee of the benefit of honest evaluations. Fortunately that theory did not succeed in court, but it shows the extent to which employers are forced to walk on eggshells. It is entirely conceivable that the employer gave this employee good evaluations out of fear that anything else would trigger a retaliation complaint.

Retaliation litigation shows no signs of slowing down. Companies can reduce risk by training their supervisory staff to avoid the appearance of retaliation and by using extra care with employees once a complaint is made. But for the foreseeable future, any company that receives a complaint from an employee about any employment-related matter can anticipate being accused of retaliation as well.