

Avoiding Charges of Reprisal

How Reprisal Is Defined

The wording of the Title VII ban against discrimination, which is used for virtually every federal and state EEO statute, is very specific: “It shall be an unlawful employment practice for an employer to discriminate against any of (their) employees or applicants for employment ... because (they have) opposed any practice made unlawful ... by this title, or because (they have) made a charge, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this title.” (Section 704(a), Title VII, Civil Rights Act of 1964.)

But this protection has now been significantly expanded to areas outside discrimination. For instance, **reprisal** lawsuits have been filed for violation of an employee’s common-law employee rights (established by court decisions, rather than by written law). In these areas, unlike **reprisal** related to discrimination charges, you can be named personally in a lawsuit. Dollar damages can be huge when these cases are heard before a jury.

For example, lawsuits for big damages have been filed in response to **reprisal** against employees for filing Workers Compensation claims, “whistle blowing,” refusing to take a lie detector test, refusing to “dress up” income figures or production records, accepting jury duty, and even taking time off to vote.

Unintentional Reprisal

Many, if not all, employees are now aware that the Title VII prohibition against **reprisal** is more than a shield, it can also be a potential sword used against employers.

Termination cases may be the most expensive type of discrimination lawsuits to lose, but **reprisal** cases are the hardest to live with.

The employee who filed the charge or lawsuit is still with you, which puts you in a **no-win** situation. Acutely aware that you may be very angry, the person will now be extremely sensitive to your every action and will watch for the smallest change in your behavior.

Government agencies may investigate retaliation charges more vigorously than race or sex discrimination complaints, because the right to protest against discrimination does not mean much unless freedom from **reprisal** or retaliation is guaranteed.

Making it still tougher is the fact that, like the employee, the government agency investigators and the courts may expect management to be angry about such accusations. Since experience shows that attempts to “get even” with accusing employees may be well disguised; they may be more inclined to examine closely any evidence that would otherwise be considered weak or inadequate.

Add a supervisor’s or manager’s natural feelings of anger or defensiveness, and it is not surprising that reprisal charges may have more merit than the original charge.

What To Do

Here's the best way to behave after you learn that a charge has been filed:

- P** Act as though nothing is different. The employee may test you by asking, "Did you know I filed a charge?" just to get your reaction. The best thing to do in these cases is to indicate that you and your organization respect the employee's right to file a charge. You might say something noncommittal such as, "I'll be interested to see the outcome."
- P** Reassure the employee that the charge will not affect their working relationship with you or the agency. Explain that, if they ever feel they are being treated unfairly, they should continue to feel free to come to you and work the problem out. Make a note of your comments for your records.
- P** Avoid being drawn into any kind of discussion about the complaint or its validity. If the employee asks you about it, stress that it is your position and the agency's that anyone has a right to complain about discrimination and that such complaints will not affect their employment status in any way.
- P** Remain neutral. If, while an investigation or lawsuit is underway, the employee comes to you saying they've had a change of heart about the filing of the charge, being a witness, etc., (which may or may not be sincere) remain neutral. You may advise the individual that they have a right to withdraw the charge or complaint, adding that, "It's your personal choice and the agency respects your right to proceed or not as you wish. In any event, your decision won't affect your employment relationship with the agency."

13 "Don'ts" of Reprisal

- 1** Don't terminate or discipline an employee for filing a charge. This is the most obvious reprisal and therefore the easiest to avoid.
- 2** Don't threaten the complaining employee. For example, do not suggest, "You've got no future here," or "You'll get yours."
- 3** Don't assign more unfavorable tasks or duties than was normal for the employee previous to filing the charge, or than are currently normal for other employees. Keep the employee's job the same unless they complain about having to do a disproportionate share of the undesirable work.
- 4** Don't give the employee a bad performance review after the charge is filed when previous evaluations were good. If performance has deteriorated, write a complete explanation of how it has changed, don't just check a box.
- 5** Don't fail to give a raise otherwise due, such as a seniority raise.
- 6** Don't deny a promotion for which the employee was in line. Supervisors sometimes mistakenly think there's no way to prove that the denial of a promotion is connected with the earlier filing of a charge. But the fact is it can be proven in a number of ways: by comments the supervisor has made to others about the employee before the charge was filed; past promises of raises or promotion, promises made to the employee upon being hired; the pattern of positive documentation; performance appraisals, etc.

- 7 Don't refuse to communicate with the employee. Avoiding normal contact; even saying hello in a different manner may all be construed as **reprisal** – even if the supervisor is avoiding the employee because of the feeling that, “anything I say might get me into trouble.”
- 8 Don't over supervise – unless you can document reasons for doing it.
- 9 Don't suddenly enforce work rules previously unenforced or loosely enforced.
- 10 Don't encourage other employees to shun the person who has filed a charge.
- 11 Don't make jokes or comments about anything related to race, sex, etc., to show you have no bias. These may be read out in court in a monotone where they will sound anything but humorous.
- 12 Don't moralize or tell employees you are disappointed with them for filing a charge. Saying, “We had great hopes for you” or “You had a great future here” indicates that your evaluation of their work has changed as a result of the charge; that is discriminatory and unlawful.
- 13 Don't criticize the employee for filing the charge.

If You Are Provoked

Typical strategies calculated to provoke you to **reprisal** (or just get even with the agency for perceived wrongs) include: long periods of absence; sloppy or poor work; contrived complaints – “The desk is too low,” “The bathroom is too far,” “You're always watching me” – spending much of the day talking, trying to gain support for their case from others, complaints that co-workers have turned cold to them (which may be true).

Since you have work to do, but fear that any action you take may result in a **reprisal** charge, you're on the spot. The best thing to do is document the problem behavior. Share the memorandum with the employee before putting it in their Official Personnel File (OPF), and give a copy to personnel or the appropriate supervisor. Apply BLM's progressive discipline as you would normally.

Remember that filing a charge or lawsuit is not necessarily an attack on you. Often, the charge is filed in reaction to agency policies and guidelines or agency instructions to supervisors, rather than from animosity toward the supervisor, personally.

Finally, it is simply more practical to ignore a charge of discrimination, even one filed specifically against you, than to take it personally. **Reprisal** not only results in additional investigations and lawsuits, it weakens your side of the case on the original charge as well.