

WHAT IS REPRISAL AND HOW DO I AVOID IT?

Many of the laws and regulations covering federal employment of civilians state that employees will not be subject to reprisal for questioning management activities and practices when they file grievances or complaints, through EEO, the union, administrative procedures, the Merit Systems Protection Board or under the Whistleblower Protection Act.

For example, Part 1614 – Federal Sector Equal Employment Opportunity, states that “No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act or the Rehabilitation Act or for participating in any stage of administrative or judicial proceedings under those statutes.”

A question often asked by supervisors and managers is “*What is it?*” The Random House Dictionary defines reprisal as an “*action or an act in retaliation against someone for injuries received.*” It occurs when a supervisor or manager threatens an employee’s career because s/he filed a complaint or discussed an issue with the chain of command. Some employees define it as anything adverse that happens to them after the protected activity. This may range from denial of leave or training to adverse actions affecting their employment, including negative performance ratings, letters of counseling or reprimand, non-recommendation for reassignment or promotion, etc.

The purpose of this document is to help you, as a manager, understand what reprisal is and to guard against charges of reprisal. The information cited is from EEOC directives and case law, however, it applies equally to other types of federal sector grievances and appeals. Charges of reprisal are very serious. Case summaries and employment law digests quickly reveal that charges of reprisal are often more successful than the initial charge of harassment or discrimination.

In order to be successful in charging retaliation for a protected activity (complaint, grievance, or appeal) the initial burden is on the employee to show that 1) they engaged in protected activity; 2) the agency official was aware of the protected activity; 3) the employee was subsequently disadvantaged by an adverse personnel action; and 4) there is a causal connection between the protected activity and the adverse personnel action.

Acts of reprisal are illegal. They not only affect the recipient, but also can spread rapidly throughout the work unit. Reprisal or retaliation against an individual for complaining destroys faith in unit leadership and can damage the human relations climate. Reprisal also jeopardizes unit effectiveness, morale and cohesion.

Commanders and Directors should clearly state their opposition to reprisal of any type. Subordinate leaders should be trained to address the negative consequences of reprisal actions and their impact on the work environment. Management can cultivate a climate in which the resolution of complaints is accepted as part of mission accomplishment. Actions such as co-workers making jokes or comments, ostracizing

recipients or alleged offenders, or posting anonymous notes on the bulletin boards impact the unit. Commanders and supervisors must observe behavior, actions and moods within the work unit to be aware of and act quickly if reprisal (real or perceived) occurs. Leaders must also act quickly if "anonymous reprisals" happen within the unit.

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 are often cited as the most expensive type of discrimination cases to lose, but reprisal cases are the hardest to live with. The employee who filed the charge is still with you, which can put 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.

Retaliation charges are often investigated 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. Any act of reprisal may have a "chilling effect" on not only the grievant/complainant but also on co-workers who perceive it as evidence of the bad things that happen to those who do complain.

Making it still tougher is the fact that, like the employee, Army, EEOC investigators and the courts may expect management to be angry about accusations of discrimination or mismanagement. 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 often have more merit than the original charge.

Elements of Retaliation

There are three essential elements of a retaliation claim:

1. Opposition to discrimination or participation in covered proceedings;

- Opposition: The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he has opposed any practice made unlawful under the employment discrimination statutes. This protection applies if an individual explicitly or implicitly communicates to his or her employer a belief that its actions constitute a form of discrimination covered by any of the statutes enforced by the EEOC.

Examples include threatening to file a complaint; complaining to anyone about alleged discrimination against oneself or others; refusing to obey an order because of a reasonable belief that it is discriminatory; requesting reasonable accommodation or religious accommodation.

- Participation: It is unlawful to discriminate against anyone because they have filed an EEO complaint, testified, assisted, or participated in any manner in an investigation or any other type proceeding under the EEO process. In the federal sector, once an employee initiates contact with the EEO Office or an EEO Counselor, s/he is participating in the process.

Standards governing application of both the opposition and participation clause are similar:

a. The manner of opposition must be reasonable – public criticism and picketing are two examples. Opposition to perceived discrimination does not serve as license for the employee to neglect job duties.

b. Opposition must be based on a reasonable and good faith belief that the opposed practices were illegal. A violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. To permit an employer to retaliate against a charging party because the employer doesn't feel that the opposition or charge was reasonable or that it was unjustified would chill the rights of all individuals protected by the statutes.

c. The person claiming retaliation need not be the person who engaged in opposition. Both the individual who engaged in the protected activity and the relative, where both are employees, can challenge retaliation against a close relative of an individual who opposed discrimination. It is unlawful for an employer to retaliate against an employee because his or her spouse or other family member, who is also an employee, filed an EEO complaint.

d. You don't have to be the one who engaged in the prohibited conduct. For example, if you refused to hire someone because you knew they had filed a complaint or otherwise engaged in protected activity with a previous employer, you could be charged with retaliation.

2. Adverse Action.

a. The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.

b. Retaliatory acts can also happen after the employment relationships have ended. For example, unjustified negative job reference, refusing to provide a job reference, or informing a prospective employer of the former employee's EEO activity.

c. Retaliatory actions need not qualify as "Ultimate Employment Actions" or materially affect the terms or conditions of employment to constitute retaliation.

Some courts have held that retaliation must materially affect the terms, conditions, or privileges of employment. However, the EEOC feels that any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the complainant, participant or others from participating in the EEO process is prohibited.

3. Proof of causal connection.

a. In order to establish unlawful retaliation, there must be proof that the respondent took an adverse action because the complainant engaged in protected activity. Proof of this retaliatory motive can be through direct or circumstantial evidence.

b. Direct Evidence is any written or verbal statement by a management official that the action was taken because the complainant engaged in some type of protected activity. Although direct evidence of retaliation is rare, statements that label a complainant as a “troublemaker” or stating that “individuals that file EEO complaints should not be rewarded” are guaranteed to get a manager in trouble if a reprisal claim is filed.

c. Circumstantial Evidence is the most common method of proving that retaliation was the reason for an adverse action. An initial inference of retaliation arises where there is proof that the protected activity and the adverse action were related. Typically, the link is demonstrated by evidence that (1) the adverse action occurred shortly after the protected activity and (2) the person who undertook the adverse action was aware of the complainant’s protected activity before taking the action.

d. An inference of retaliation may arise even if the time period between the protected activity and the adverse action was long, if there is other evidence that raises an inference of retaliation. For example, in one case there was a 14-month interval between the time the complainant filed a charge and the alleged retaliation. However, the complainant was able to show that the manager mentioned the complaint at least twice a week during the interim and termination occurred just two months after the EEOC dismissed her charge. This is also an example of where the retaliation charge was stronger than the discrimination charge in the initial complaint.

What To Do

Here are some suggestions on the best way to behave after you learn that a charge has been filed against you:

✓ 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.”

✓ Reassure the employee that the charge will not affect their working relationship with you, Fort Knox or the Army. 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.

✓ 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 Army's that anyone has a right to complain about discrimination and that such complaints will not affect their employment status in any way.

✓ 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 Army respects your right to proceed or not as you wish. In any event, your decision won't affect your employment relationship with Fort Knox."

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 were 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. Look into this type of allegation and make a change only if the complaint is valid.

4. Don't give the employee a bad performance review after the charge is filed when previous evaluations were good. If performance has deteriorated, address the problem with the employee. Follow the guidelines in Fort Knox Regulation 690-6, Performance Management. Don't just check a box when it is time to complete the performance appraisal, and don't wait until the end of the rating period to bring up performance problems.

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. Be sure that all employees are held to the same standards (duty hours, breaks, work production, leave requests, etc.)

10. Don't encourage other employees to shun the person who has filed a charge. It is important not to discuss the charge with those who do not have a “need to know.”

11. Don't make jokes or comments about anything related to race, sex, etc., to show you have no bias. These may later be read out during an investigation or in court 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 office personnel file, and give them a copy. Apply 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.

If you have any questions concerning this guidance, please contact the Fort Knox EEO Office, 624-6593, or SJA, Administrative Law at 624-4668.

Sources:

EEOC Compliance Manual, Section 8: Retaliation. Additional information can be found at www.eeoc.gov.

The Defense HRM Knowledge Based System, Virtual Interactive Personnel, at www.cpms.osd.mil/vip/per_data/263.htm.

Bureau of Land Management, Office of Fire and Aviation,
www.fire.blm.gov/textdocuments/repslnet.pdf.

PROPOSED E-MAIL MESSAGE

SUBJECT: Mandatory Training

1. In order to comply with corrective actions directed by the Equal Employment Opportunity Commission and HQ DA, all supervisors of civilian employees within the Armor Center and Fort Knox must read the attached document by **22 November 2002**.
2. Reprisal against employees for filing complaints, grievances or appeals of any type is forbidden by law and regulation. This is a serious offense and can result in serious consequences for not only the management official concerned, but also for the installation. I fully expect that you will heed the guidance in the attached document, and act accordingly.
3. In order to meet EEOC and HQ DA reporting requirements, provide the EEO Office, marion.mcaleer@knox.army.mil a by name listing of who your supervisors are and certification that they have read and understood the attached material. If you have any questions, you can contact the EEO Office at 624-2545.