

## **EEO REPRISAL -- DO'S AND DON'TS FOR SUPERVISORS**

**What is reprisal?** 29 C.F.R. 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 (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Equal Pay Act or the Rehabilitation Act or for participating in any stage of administrative or judicial proceedings under those statutes.”

**Why is this important?** Recent case law has revealed that charges of reprisal are often more successful than the initial charge of harassment or discrimination and are often relatively easier to prove, especially claims of *per se* reprisal. Adjudicators often place a high priority on claims of retaliation because any act of reprisal may have a “chilling effect” on not only the complainant but also on co-workers who perceive it as evidence of the bad things that happen to those who do complain.

### **How can an employee show reprisal?**

#### **Traditional Claims of Reprisal – Retaliatory Action Claims:**

In order to be successful in making a traditional claim of retaliation for protected EEO activity (or opposing any practice made unlawful by Title VII, the ADEA, the Equal Pay Act, or the Rehabilitation Act), 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.

#### **Per Se Reprisal – Creating a “Chilling Effect”:**

Alternatively, an employee can successfully make a claim of *per se* reprisal simply by showing that a management official took an action or made a statement that might dissuade a complainant or others from engaging in protected activity, also known as creating a “chilling effect” on filing an EEO complaint. This includes any actions or negative comments made by management officials concerning an individual who participates in the EEO process or regarding the EEO complaint process itself. *Per se* violations are especially problematic for supervisors because findings of *per se* reprisal are automatic violations of the anti-retaliation provisions of Title VII that do not require evidence of any adverse personnel action being taken against the complainant.

### **Do's for Supervisors:**

- **How to behave after learning an employee filed a complaint against you:**
  1. Act as though nothing is different. The employee may test you by asking, “Did you know I filed a complaint?” just to see your reaction. The best thing to do in these cases is to indicate that you respect the employee’s right to file a complaint if they believe they have been aggrieved.

2. Reassure the employee that their complaint will not affect their working relationship with you, upper management, or the Agency. Explain that, if they ever feel they are being treated unfairly, they should continue to feel free to come to you for assistance. Make a note of your comments for your records, including writing a follow-up e-mail to the employee summarizing your conversation and giving them an opportunity to correct anything they believe you documented incorrectly.
3. Avoid discussing the specifics of the complaint or its validity with the complainant or anyone else, unless necessary to do so based on the nature of the complaint, i.e. a claim of harassment that requires supervisory intervention. If the employee asks you about their complaint, continue to stress that it is your position and the Agency's that employees have a right to file a complaint about discrimination and that such complaints will not affect their employment status in any way.
4. Remain neutral. It is not the supervisors role to state, or behave in a manner that evinces, his or her support or opposition of a complainant's claim of discrimination.

### **Don'ts for Supervisors:**

- **How NOT to behave after learning that an employee filed a complaint against you:**

1. Don't terminate or discipline an employee for filing a complaint.
2. Don't threaten the complaining employee.
3. Don't criticize the employee for filing a complaint.
4. Don't assign more unfavorable tasks or duties than were normal for the employee previous to them filing the charge, or than are currently normal for other employees, unless you had planned to change the employee's assignments before they filed the complaint. 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.
5. Don't give the employee a bad performance review after the complaint is filed when previous evaluations were good, unless the employee's performance deteriorates markedly. If performance has deteriorated, address the problem with the employee immediately. 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.
6. Don't deny a WIGI otherwise due.
7. 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 complaint. However, it can be proven in a number of ways, such as by: (1) comments the supervisor made to others about the employee before the complaint was filed; (2) past promises of a promotion made to the employee; (3) promises made to the employee upon being hired; (4) a pattern of positive documentation; and/or (5) positive performance appraisals.
8. Don't refuse to communicate with the employee. Avoiding normal contact, even saying hello in a different manner, may 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.”

9. Don't over supervise – unless you can document reasons for doing it.
10. Don't suddenly enforce work rules previously unenforced or loosely enforced. Be sure that all employees, including those who have engaged in protected EEO activity, are held to the same standards regarding duty hours, breaks, work production, leave requests, etc.
11. Don't encourage other employees to ostracize the person who filed the complaint. You **MUST NOT** discuss a complaint with those who do not have a "need to know."
12. Don't make jokes or comments about anything related to race, sex, etc., to show you have no bias.

- **What NOT to say in order to avoid claims of *per se* reprisal (Common Mistakes):**

1. Don't tell employees you are disappointed with them for filing a complaint.
2. Don't tell employees "We had great hopes for you" or "You had a great future here"—these phrases indicate that your evaluation of their work has changed as a result of the complaint being filed.
3. Don't tell employees "I wish you would have talked to me about this first."
4. Don't tell employees that filing an EEO complaint was the wrong way to go about getting their problems resolved.
5. Don't tell employees "I don't think an EEO complaint will help your career."
6. Don't tell employees that they have the right to challenge management actions by filing EEO complaints, but that they will lose.
7. Don't tell an employee's co-workers that the employee filed a complaint.
8. Don't tell an employee's co-workers to watch what they say around a fellow co-worker because that employee has filed a complaint.
9. Don't say you are "sick of this nonsense" or "tired of dealing with complaints."
10. Don't try to unnecessarily entangle yourself in the EEO process
11. Don't try to unnecessarily control when an employee meets with an EEO counselor or prepares his or her formal complaint – employees are afforded a reasonable amount of official time to prepare the formal complaint.

### **How to Handle Provocation from Employees:**

Employees often engage in strategies calculated to provoke you to commit reprisal (or just get even with the agency for perceived wrongs). Typical strategies 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 in the office; and
- Complaints that co-workers have turned cold to them (which may be true)

- **What to do if an employee provokes you to commit reprisal after filing a complaint?**
  1. The best thing to do is **document the employee's problem behavior**. Share the memo with the employee before putting it in their personnel file and give them a copy.
  2. Remember that when an employee files a complaint that names you as a responsible management official it is not necessarily an attack on you. Complaints are often filed due to a lack of communication or in reaction to agency policies and guidelines to supervisors, rather than from animosity toward the supervisor personally.
  3. Finally, it is simply more practical to ignore a claim of discrimination, even one filed specifically against you, than to take it personally. Reprisal not only results in additional EEO complaints and corresponding investigations, it weakens your side of the case on the original claim of discrimination as well.

Sources: EEOC Compliance Manual, Section 8: Retaliation. Additional information can be found at [www.eeoc.gov](http://www.eeoc.gov).