

## RETALIATION: GUIDANCE AND INFORMATION (FAQs)

William & Mary prohibits any form of retaliation against people who in good-faith report or complain of discrimination or harassment as defined in university policies, misconduct by an employee that is inconsistent with state, local or university policies, or who report wrongdoing of a federal or state law or regulation, to the Fraud, Waste and Abuse with the Office of the State Inspector General (OSIG).

**Who is protected by these laws and policies?** Anyone who engages in “protected activity” (described below), whether that person is an employee, applicant, student, or former employee or student. Witnesses and people who support a complainant are also protected from retaliation.

**What is a protected activity?** The most common protected activity is making a good-faith report (or complaint, allegation, etc.) of misconduct, discrimination, harassment or illegal conduct. Participating in an investigation, supporting someone else who makes a report, and some other actions may also be protected activity. It doesn't matter if the complaint is not substantiated (technically, this would mean that a university investigation doesn't find sufficient evidence to support a finding of a violation); the law and university policy still prohibit retaliating against the complainant, so long as the complaint is made in good faith. Please note that employees are obligated to raise complaints and concerns in a professional manner, using established reporting channels.

**What is retaliation?** Retaliation occurs where (1) someone engages in a protected activity, (2) he or she suffers an adverse action, and (3) the protected activity motivated the adverse action.

Some examples of behavior that may constitute adverse action and retaliation include:

- Giving a worse grade
- Exclusion from activities or privileges open to other students or employees
- Unjustified negative performance evaluations or references to potential employers
- Acceleration of disciplinary action
- Making critical comments about the complainant to co-workers
- Isolating the complainant
- Increasing the level of supervision of the complainant—scrutinizing them more closely, starting a file of perceived bad acts, etc.
- Sudden enforcement of previously unenforced policies
- Assigning more onerous work or taking advantageous assignments/responsibilities away
- Making the employee's work conditions more difficult
- Denial of training opportunities open to others or previously provided
- Any form of termination, refusal to hire or denial of a promotion

Although conduct does not need to be egregious to be retaliation, trivial slights or annoyances are **not** serious enough to constitute adverse action.

**The list of adverse actions includes “making critical comments.” Does that mean that anything negative that the respondent says about me is retaliation?** No. Petty slights and annoyances are not sufficient to constitute retaliation. Examples of trivial or petty actions that courts have used include angry looks, refusing to take someone out to lunch, speaking to someone in a manner they do not like, and laughing at someone. (Each of these would be considered in context.) Also, importantly, a negative comment that is justified, such as a

legitimate, poor performance evaluation, is not retaliation. In addition, speech is often subject to special consideration, either because of the First Amendment or because of other privileges and protections.

**Who is prohibited from retaliating?** The strongest retaliation prohibitions apply to employees. Retaliation most commonly is done by a supervisor, but may come from others. For example, coworkers may exclude or “gang up” on a reporting party to get back at them for raising a complaint.

**What do I do if I think I am being retaliated against?** Let the person handling your complaint or another staff person in the Office of Compliance & Equity know right away.

**What should I not do if I think I am being retaliated against?** Experiencing retaliation is upsetting. Please try to remain professional and do not become disruptive or insubordinate. The Civil Right Review Team will assess reports of retaliation and refer incidents to the Investigators on a case-by-case basis considering a totality of the circumstances.

Investigators may conduct interviews or collect other information to verify that the event or action occurred/is occurring and make a preliminary assessment as to whether it is for a legitimate reason or retaliation. In some cases, the Office of Compliance & Equity may stop or delay the action pending a full investigation. This is most likely to happen when stopping or delaying the action will not deprive other people of their rights or cause significant disruption to business operations or cost and if the action is not easily reversible after a finding of responsibility for retaliation. If an action can be undone after a finding of responsibility for retaliation, then the action may proceed during the investigation.

**What is my obligation as a supervisor?** Supervisors should ensure that respondents and co-workers are not retaliating against a reporting party/complainant or any witnesses who participate in the investigation. Supervisors should take the time to observe interactions between employees and should take reports of retaliation seriously. If a supervisor witnesses retaliation, they should direct the employee(s) to cease their conduct. If a supervisor receives concerns of retaliation directly or indirectly from a reporting party, they should report it to the Office of Compliance & Equity at [reportconcern@wm.edu](mailto:reportconcern@wm.edu).

**Does this mean I cannot discipline an employee who has engaged in protected activity?** No. An employee who has engaged in protected activity does not get a “free pass” to violate university standards of conduct or other policies. But discipline cannot be motivated by the employee’s protected activity. You must have and be prepared to prove the legitimate, non-retaliatory basis for the disciplinary action. You should consult with Human Resources and the Office of Compliance & Equity prior to taking such action. Office staff may require you to delay or modify your planned action to prevent actual or apparent retaliation and allow prompt resolution of the underlying complaints.

**Or that I cannot address performance problems?** Employees who have engaged in protected activity are held to the same expectations of performance as other employees. But as with discipline, negative performance evaluations are adverse actions, so they must be justified and justifiable. Prior to issuing a negative interim or annual performance evaluation or putting an employee on a performance improvement plan, you must be confident that you are not letting the employee’s complaint activity negatively color your assessment of the employee. You should consult with University Human Resources and the Office of Compliance & Equity who may advise you to delay or modify your planned action to prevent actual or apparent retaliation and allow prompt resolution of the underlying complaints.