

DISCRIMINATORY RETALIATION: GUIDANCE AND INFORMATION (FAQs)

Federal anti-discrimination laws make it unlawful to retaliate against people who complain about discrimination, harassment, or sexual misconduct. Retaliation is a serious violation of university policy.

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 retaliation? Retaliation occurs where (1) someone engages in a protected activity (discussed in the next FAQ), (2) he or she suffers an adverse action, and (3) the protected activity motivated the adverse action. If an employee does something negative to a student because the student filed a complaint (for example), that is likely to be retaliation. (If the “something negative” was trivial, such as not saying “hello” once, it would not rise to the level of retaliation.)

What is a protected activity? While filing a discrimination complaint or grievance, either internally or with the EEOC or OCR, is the most common type of protected activity, any opposition to a practice believed to be unlawful discrimination is a protected activity. Other examples of such opposition include threatening to file a formal complaint, making informal complaints about alleged discrimination, or refusing to obey an order reasonably believed to be discriminatory.

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.

What is an adverse action? Here are some examples of behavior that may, collectively or in some cases in isolation and depending on the circumstances, constitute adverse action and retaliation:

- Denial of a promotion
- Giving a worse grade
- Exclusion from activities or privileges open to other students or employees
- Unjustified negative performance evaluations and reports
- Acceleration of disciplinary action
- Making critical comments about the complainant to co-workers or others (note that this type of behavior is less likely to constitute an adverse action if the people involved are students rather than employees)
- 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
- Abolishing a position
- Denial of training opportunities open to others or previously provided
- Giving an undeserved negative reference
- Refusal to hire
- Unwarranted contesting of unemployment compensation claim.

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. First, the Supreme Court has said that “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, 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 (which does not provide absolute, unlimited protection - for example, speech can be harassment, which is not protected speech) or because of other privileges and protections. A particularly important privilege applies to what a party says in the context of a complaint, investigation, or adjudication process. Generally, anything that is said by a party in this context, so long as it is pertinent, material, or relevant to the issues, cannot be considered retaliation.

Who can retaliate? Retaliation may come from supervisors or managers or co-workers or peers. For example, co-workers may exclude or gang up on a reporting party to get back at him or her 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. If you are a student, you could also or instead contact the Dean of Students Office.

You may be angry or upset. If you are an employee, please try to remain professional and not become disruptive or insubordinate. Investigators will look into reported retaliation promptly. Investigators may conduct interviews or collect other information to verify that the event or action 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 will stop or delay the action or undo what has been done pending a full investigation. This is most likely to happen when stopping or delaying or undoing will not deprive other people of their rights or cause significant disruption to business operations or cost. How negatively the action affects you is also a factor—if the action you are complaining of has serious consequences for you, the Office will try hard to stop or delay it. In other cases, full investigation is needed in order to stop or undo the action. For example, if you receive a lower salary increase than you believe you are entitled to and that this is retaliation, that is likely to require full investigation including a decision by the Provost. In that situation, another factor that the investigator will take into account is that if the investigation does determine that it was retaliation, your salary can be retroactively adjusted to compensate you.

I am a supervisor. What does this mean for me? Supervisors and managers have special obligations relating to preventing and responding to retaliation. Please read the Memo to Managers on retaliation, available at http://www.wm.edu/offices/compliance/topics/messages_memos/index.php.

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, nondiscriminatory 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 also should consult with Human Resources and the Office of Compliance & Equity. 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.

Who can I go to if I have other questions? The university’s Title IX and ADA/Rehabilitation Act Coordinator, Kiersten Boyce, can provide guidance. Students can get help from the Dean of Students Office. University Counsel Deborah Love can provide legal advice to employees. The EEOC provides information about retaliation on its website: <http://www.eeoc.gov/laws/types/facts-retal.cfm>.