

RETALIATION: GUIDANCE AND INFORMATION (FAQs)

William & Mary prohibits any form of retaliation against people who report or complain of illegal or unethical activity. State and federal laws also prohibit certain forms of retaliation.

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. 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.

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:

- 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
- 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
- Giving an undeserved negative reference.

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, 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, but because addressing retaliation often potentially involves disciplining students or employees, who have Constitutional due process rights, investigation may take some time.

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, such as a termination, that makes it more likely that the action will be delayed or stayed. 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, 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 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.