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Risk Management Masterclass:

How to Mitigate the Risk Around Retaliation Claims

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Retaliation Claim Framework

1 Protected activity

Did the employee complain, participate in an investigation, request leave or accommodation, or support another employee?

2 Employer knowledge

Who knew about the protected activity—and when?

3 Adverse employment action

What employment decision or treatment followed?

4 Causal connection

Do timing, inconsistent treatment, shifting explanations, or documentation suggest a link?

Recognizing Protected Activity

- Complaints
  - Internal complaint to HR or management
  - External complaint to a government agency
  - Lawsuit against the employer
- Participation
  - Participation in an internal or external investigation
- Requests
  - Accommodation under a statute
  - Leave requested or taken under a statute
  - Workers' compensation claim
- Support for Others
  - Complaining on another employee's behalf
  - Support for another employee's complaint

Moore v. Coca-Cola Bottling Company (6th Cir. 2024)

- Race discrimination and retaliation
- Plaintiff discharged for violating employer's drug and alcohol policy
- Plaintiff had filed grievances against the employer alleging race discrimination, including one six days before his termination
- No direct evidence of race discrimination
- Plaintiff argued that he was singled out for drug testing and the drug and alcohol policy was applied differently to white employees

Moore v. Coca-Cola Bottling Company (6th Cir. 2024)

- Sixth Circuit reversed the trial court's grant of summary judgment for the employer
- Takeaways:
  - Close time between protected activity and adverse action is suspect
  - Failure to apply employment policies as written suggests pretext
  - It is always problematic to apply the policy inconsistently to different employees

McIver v. Bridgestone Americas, Inc. (4th Cir. 2022)

- Hostile work environment and retaliation
- In 2013, Plaintiff first complained that someone was tampering with her machine
- In 2017, Plaintiff complained about a negative performance evaluation and suggested she viewed the machine tampering as related to racially charged events dating back to 2006
- In 2018, Plaintiff again complained that someone was tampering with her machine but did not mention race
- That same year, she was transferred to another department

McIver v. Bridgestone Americas, Inc. (4th Cir. 2022)

- Fourth Circuit affirmed summary judgment for the employer
- The complained of racial harassment was not committed by supervisors and was too remote in time to support claim
- Found that 2018 complaints about tampering with her machine were not protected activity under Title VII because they were not linked to any racial motivation
- Takeaway:
  - Not all complaints are protected activity

Wallace v. Performance Contractors (5th Cir. 2023)

- Discrimination, harassment, retaliation
- Plaintiff was a construction worker
- Plaintiff complained about sex-based comments from co-workers and that she was not permitted to work at elevation because no safety harnesses fit women
- Employer terminated her employment because Plaintiff violated attendance policy
- Trial court had granted summary judgment for employer on all claims

Wallace v. Performance Contractors (5th Cir. 2023)

- Fifth Circuit reversed summary judgment on all claims
- Found that complaints classified as "general gripes" were protected activity
- Employer did not apply attendance policy equally to men and women
- Takeaways:
  - Ensure equal application of all employment policies
  - No "magic words" are required for protected activity

Noonan v. Consolidated Shoe Company, Inc. (4th Cir. 2023)

- Sex discrimination in pay and retaliation
- Plaintiff asked about a male coworker being paid more than she and her supervisor told her it was a "fireable offense" to know someone else's pay
- HR stepped in, supervisor apologized, and CEO ordered an investigation into pay practices
- Plaintiff argued she was retaliated against based on her supervisor's statement, her responsibilities changing, and the company refusing to give her a recommendation letter

Noonan v. Consolidated Shoe Company, Inc. (4th Cir. 2023)

- Fourth Circuit affirmed summary judgment for the employer
- Court held "fireable offense" comment was not materially adverse where supervisor apologized, HR supported the employee, and the company investigated her concerns instead of acting on the comment
- Takeaway:
  - Prompt, good-faith response can neutralize a supervisor's misstep

Hairston v. Wormuth (8th Cir. 2021)

- Hostile work environment and retaliation
- Plaintiff had complained to EEO office about sexual harassment and perception she was being retaliated against for complaining of sexual harassment
- Her employment was terminated 10 days later
- Employer's reasons were detailed in lengthy memorandum
- 8th Cir. affirmed summary judgment for employer on hostile work environment claim

Hairston v. Wormuth (8th Cir. 2021)

- 8th Cir. reversed summary judgment for employer on retaliation claim
- Found issue of fact because employer waited 8 months to discharge Plaintiff since knowledge of misconduct
- Notably, decision was 10 days after EEO complaint
- Employer ultimately prevailed at trial, but was required to incur substantial expense
- Takeaways:
  - Can win on the underlying claim and still lose the retaliation claim
  - Waiting too long to terminate creates risk if employee later engages in protected activity
  - Courts suspicious of terminations citing pre-protected activity events as the reason for termination

Roberts v. Glenn Industrial Group, Inc. (4th Cir. 2021)

- Sexual harassment and retaliation
- Plaintiff complained about sexual harassment by his supervisor to: (i) second-level supervisor; (ii) another supervisor; and (iii) HR manager
- Plaintiff, a diver's assistant for underwater inspection and repair services to utility companies, was discharged by the company's CEO after two safety incidents
- Plaintiff argued that the CEO had constructive knowledge of his complaints

Roberts v. Glenn Industrial Group, Inc. (4th Cir. 2021)

- 4th Circuit affirmed summary judgment for employer on the retaliation claim
- Held that, to show causation, the plaintiff must prove the decisionmaker had actual knowledge of the protected activity
- Also held a 3-month gap, without evidence of a causal link, did not support an inference of retaliation.
- Takeaway:
  - It is important only to share information about protected activity with decisionmakers if it is necessary for them to know

Miller v. Chicago Transit Authority (7th Cir. 2021)

- Race discrimination and retaliation
- Plaintiff 1 was a general manager for bus maintenance
- Plaintiff 2 was a mechanical officer for bus maintenance
- Plaintiffs discharged after months of bus cooling problems that drew the attention of the company's president
- Plaintiffs argued they were discharged for filing EEO complaints about the vice president of vehicle maintenance shortly before their discharges.

Miller v. Chicago Transit Authority (7th Cir. 2021)

- Seventh Circuit affirmed summary judgment for employer
- Found one plaintiff's complaint that he felt "targeted" and treated unfairly was not protected activity when he never attributed the treatment to race
- Found there was no evidence that the decisionmaker knew of the complaints when plaintiffs had not told anyone and EEO officer had not told him until a month after discharges
- Takeaway:
  - Timing alone can't establish causation if the decisionmaker does not know about the protected activity

Gray v. State Farm (6th Cir. 2025)

- Retaliation
- Plaintiff helped a co-worker seek accommodations for a disability
- After doing so, the manager investigated the Plaintiff for time theft
- Plaintiff's employment terminated for time theft

Gray v. State Farm (6th Cir. 2025)

- Sixth Cir. reversed grant of summary judgment for employer
- Noted the investigation into time theft began immediately after protected activity
- No evidence other employees were investigated as well
- Found plaintiff plausibly alleged "cat's paw" claim
- Temporal proximity between protected activity and adverse action suggested pretext
- Takeaway:
  - Policy violation alone insufficient – watch for timing and equal treatment

Sadare v. Bosch Auto. (D. Minn. 2022)

- Disability discrimination, failure-to-accommodate, and retaliation
- Plaintiff placed on PIP for lack of reliability and accuracy
- In PIP meeting, disclosed his disability for the first time
- Employee sent demand letter from attorney
- HR asked for more information as demand letter did not request accommodation or disclose disability
- Plaintiff's employment terminated for failure to engage in PIP process and poor performance

Sadare v. Bosch Auto. (D. Minn. 2022)

- District court denied summary judgment for employer
- Found attorney demand letter was protected activity
- The Court explained:
  - "Bosch is not insulated from liability because it documented Sadare's prior performance problems. When an employer has known about its stated reason for taking adverse action against an employee for an extended period of time, but only acts after the employee engages in protected activity, the employer's earlier inaction supports an inference of pretext."

Jury Verdicts

- *Billesdon v. Wells Fargo Securities* - W.D.N.C.
  - Verdict: $4,225,558 back pay, $14M front pay
  - Affirmed by Fourth Circuit (2026)
- *Boyle v. Wayfair* – Mass. (2026)
  - Verdict: $4.7M
- *Mohamed v. Society for Human Resource Mgmt.* – D. Colorado (Dec. 2025)
  - Verdict: $11,500,000 ($1.5M compensatory; $10M punitive)

REMEMBER

Section 1981 claims and some state law claims are not capped

Tips - Plan & Prepare

01 Have and publish a no-retaliation policy

02 Train employees to recognize protected activity

03 Coach managers to avoid reactions that could appear retaliatory

04 Apply policies and discipline consistently

05 Document and address performance concerns promptly

REMEMBER

Delayed or inconsistent performance management can make later action appear retaliatory.

Tips - React & Respond

01 Determine whether protected activity is involved and assess the risks

02 Investigate concerns promptly

03 Follow up with the person who raised the concern

04 Consider appropriate interim measures, including moving someone during investigation

05 Identify and correct any manager misconduct

REMEMBER

Reactive conduct or careless communications may themselves appear retaliatory.

Tips - Document

01 Ask for and document the basis for complained of conduct

02 Communicate thoughtfully about the protected activity and complaining party

03 Send meeting-summary emails

04 Review and correct automated notes

05 Insulate decision-makers from unnecessary knowledge of protected activity where possible

REMEMBER

Don't rely on incomplete or inaccurate records.

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