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## **Retaliatory Personnel Action Part One – Statutory Remedies**

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▶ AELE has written a specimen Policy prohibiting retaliation.

You can view it [here](#) (and save or print it.)

### **1. Introduction**

There are two kinds of retaliation. One is where an employer violates a statute that specifically authorizes civil actions for retaliation. The other is arises under the Constitution, an applicable bargaining agreement, or as a matter of public policy. It also has been styled as a breach of an implied covenant of good faith and fair dealing. Part One of this article addresses *statutory retaliation* against an employee.

The Congress has enacted a series of laws that ban discrimination. Other laws address specific subjects like occupational safety and whistle blowing. As part of that legislation, there are prohibitions against retaliation and remedies are created. A few of these are:

<a href="#">Age Discrimination in Employment Act</a>	<a href="#">29 U.S. Code § 623 (d)</a>
<a href="#">Americans with Disabilities Act</a>	<a href="#">42 U.S. Code § 12203 (a)</a>
<a href="#">Civil Rights Act of 1964</a> (Title VII)	<a href="#">42 U.S. Code § 2000e-3(a)</a>
<a href="#">Equal Pay</a> (Under §206 (d) of Minimum Wage law)	<a href="#">29 U.S. Code § 215 (a)(3)</a>
<a href="#">Fair Labor Standards Act</a>	<a href="#">29 U.S. Code § 215 (a) (3)</a>
<a href="#">Family and Medical Leave Act</a>	<a href="#">29 U.S. Code § 2615</a>
<a href="#">Occupational Safety and Health Act</a>	<a href="#">29 U.S. Code § 660(c)</a>
<a href="#">Whistleblower Protection Act</a> (Federal employees)	<a href="#">5 U.S. Code § 1221</a>

## 2. Retaliation where discrimination is alleged

Some employees are unlikely to file a discrimination complaint, believing that it would jeopardize their career path. To overcome that reluctance, anti-retaliation provisions accompany the legislation.

The EEOC has statutory power to enforce Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act – all of which prohibit retaliation by an employer, employment agency, or a labor organization because an individual has engaged in protected activity.

In 1998 the EEOC modified its [Compliance Manual](#) to prohibit retaliation for “filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the applicable statute.” FEP Manual (BNA) 405:7581. The amendment also holds individual supervisors liable for any adverse treatment, relying on [Munday v. Waste Mgmt. N.A.](#), #94-2193, 126 F.3d 239 (4th Cir. 1997).

The Manual explains that there are three essential elements of a retaliation claim: [1]

1. ***protected activity*** – opposition to discrimination or participation in the complaint process,
2. ***adverse action*** – it must be “material,” and

### 3. *causal connection* – between the protected activity and the adverse action

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination. Retaliation against spouses, relatives and others in close proximity to a complaint is not covered unless they participate in filing or proving the complaint. [2]

The Supreme Court has said that the function of an anti-retaliation provision is to “prohibit employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts or their employers. [Burlington Northern and Santa Fe Rwy. v. White](#), 548 U.S. 53 at 68 (2006). The touchstone for judging an adverse action is *deterrence*.

The Supreme Court also has held that former workers are “employees” within the meaning of Title VII, for the purpose of enforcing its anti-retaliation provisions. [Robinson v. Shell Oil Co.](#), # 95-1376, 519 U.S. 337 (1997).

### *Age discrimination*

Section 623(d) of the ADEA specifically prohibits retaliation by non-federal employers. Initially some courts ruled that federal employees lacked a remedy for retaliation. The Supreme Court specifically overruled those cases. [Gomez-Perez v. Potter](#), #06-1321, 128 S.Ct. 1931 (2008). A retaliation claim can be added to the underlying discrimination complaint, as was done by a Connecticut police officer in [McInnis v. Weston](#), #3:03CV1803, 375 F.Supp.2d 70 (D. Conn. 2005).

### *Disabilities discrimination*

The Justice Dept. brought its first ADA retaliation suit against a rural town for terminating a volunteer EMT who had won a disability discrimination settlement against the town. The litigation resulted in a consent decree and injunction. [U.S. v. Town of Tatum](#), #CIV-97-1219 (D.N.M. 1998).

A federal court in Florida upheld a damages claim for a corrections officer who alleged that she was fired in retaliation for making disabilities discrimination complaints. [Rumler v. Fla. Dept. of Corrections](#), #2:06-cv-522, 546 F. Supp.2d 1334 (M.D. Fla. 2008).

A former Homeland Security officer won \$220,000 in back pay, \$780,000 in front pay, and \$1.5 million for mental anguish after he was transferred and later terminated in retaliation for filing a disability and race discrimination lawsuit. [Hudson v. Chertoff](#), #05-cv-60985 (S.D. Fla. 2006). [3]

### ***Race Discrimination***

The Eighth Circuit declined to dismiss a retaliation action brought by five county employees who were reassigned or transferred to less desirable jobs soon after they complained of race discrimination. Management claimed that the plaintiffs were reassigned to adjust intra-agency workloads, but workload variations had never resulted in their reassignments in prior years. [Betton v. St. Louis County](#), #07-1634, 307 Fed. Appx. 27, 2009 U.S. App. Lexis 957 (Unpub. 8th Cir.).

Although it was five years between the filing of an EEO complaint against the Bureau of Prisons and the denial of a promotion, a federal court declined to dismiss the employee's lawsuit. After the Bureau paid \$10,000 from the agency's budget to settle the plaintiff's EEO complaint, his application for a position was denied five times. [Mack v. Mukasey](#), #06-cv-00350, 2008 U.S. Dist. Lexis 76111, 104 FEP Cases (BNA) 799 (D. Colo.).

### ***Religious discrimination***

A federal court refused to dismiss a retaliation lawsuit brought by an Islamic, Jamaican born, African-American FBI agent. While assigned to the U.S. Embassy in Saudi Arabia, he converted to Islam. After that, he was subjected to a file review, an on-site review, and a loyalty investigation. The court found that a "mere investigation" may constitute a material, adverse personnel action. There was evidence that the security investigation poses an objective threat to an agent's career. [Rattigan v. Holder](#), #04-2009, 604 F. Supp.2d 33 (D.D.C. 2009); [Rattigan v. Gonzales](#) at 503 F. Supp.2d 56 (D.D.C. 2007).

### ***Sex discrimination***

A California appeals court affirmed a verdict for a former police officer who alleged sex discrimination and retaliation. The jury awarded \$530,012 in economic and \$372,503 in non-economic damages on her claim for discrimination, plus \$59,150 in economic and \$287,500 in non-economic damages on her claim of retaliation. [Zanone v. City of Whittier](#), #B189567, 162 Cal. App.4th 174, 75 Cal. Rptr.3rd 439 (2nd Dist. 2008).

A Los Angeles fire captain was awarded \$3.75 million in his retaliation lawsuit, including \$2.96 million for pain and suffering, after he refused to lower physical fitness standards for women recruits. He alleged that he suffered heart problems after management tried to punish him and he was denied desired assignments. [Lima v. City of Los Angeles](#), #BC353261 (Super. Ct.); verdict rptd. in *Natl. Law Jour.* (6-18-2007).

In an Oklahoma case, a three-judge panel of the Tenth Circuit noted that although the plaintiff was fired from her job as a jailer on the day after she gave a deposition in a Title VII lawsuit where she supported another officer, there were nondiscriminatory reasons for firing her. There was a prisoner suicide on her watch, and she allegedly was dishonest in the death investigation. [McGowan v. City of Eufala](#), # 04-7083, 472 F.3d 736 (10th Cir. 2006).

### ***Sexual Harassment***

A Los Angeles jury awarded \$3.6 million to a male officer who claimed that he was demoted and suffered retaliation after supporting a female officer's harassment charges. [Bender v. City of Los Angeles](#), Super. Ct. #BC361139; L. A. Times, Nov. 13, 2008. The woman also filed her own lawsuit; [Fuller v. City of Los Angeles](#), Super. Ct. #BC346464.

A male NYPD sergeant won \$300,000 after he had his firearms removed from his home and was transferred to manage a filthy storage room in retaliation for complaining about sexual harassment by a woman lieutenant. [Marchisotto v. City of New York](#), #05Civ. 2699, 2007 U.S. Dist. Lexis 27046, 100 FEP Cases (BNA) 1114 (S.D.N.Y. 2007); [affirmed](#), #07-1794, 299 Fed. Appx. 79, 2008 U.S. App. Lexis 23241 (2nd Cir.).

### **3. Filing a complaint does not immunize misconduct**

The Seventh Circuit rejected an action brought by a jailer who claimed that she was fired in retaliation for filing a sexual harassment complaint. She unlawfully tape-recorded her meeting with superiors. "Title VII does not grant employees license to engage in dubious self-help activities to obtain evidence." [Argyropoulos v. City of Alton](#), #07-1903, 539 F.3d 724 (7th Cir. 2008).

A probationary police officer, whose termination was sought by the police dept. on the day after she filed a discrimination complaint with its equal employment opportunity

office, did not show the timing was anything but a coincidence; she had received negative performance evaluations for months. Vails v. Police Dept. of City of N.Y., 54 F. Supp.2d 367 (S.D.N.Y. 1999).

#### **4. After acquired knowledge**

It is not uncommon when an employer investigates a discrimination complaint to learn that either (a) the employee's job application was untruthful and he or she would not have been employed if the truth was known at the time of hiring, or that (b) the employee engaged in unrelated misconduct that would warrant termination.

The Supreme Court has disallowed the use of "after acquired evidence" to *avoid* liability in discrimination cases. However, later-discovered evidence that is serious enough to impair a worker's fitness for continued employment (a) will bar reinstatement or an award of front pay and (b) limit the amount of back pay due. Generally, back pay awards in such cases run from the day of termination to the day the untruthfulness or misconduct was discovered.

In the case that reached the Supreme Court, the plaintiff admitted, during a deposition, to making copies and removing confidential documents from her employer's files. In its unanimous opinion, the justices wrote that barring all back pay claims "would undermine the [statute's] objective of forcing employers to consider and examine their motivations" and would fail to penalize them for illegal discrimination.

But, "it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." As a general rule, "neither reinstatement nor front pay is an appropriate remedy" where serious misconduct has been proven. The proper remedy must be addressed on a case-by-case basis.

The statutory violation "must be deterred and compensated without undue infringement upon the employer's rights and prerogatives." The court was concerned that employers who are sued might "undertake extensive discovery into an employee's background or performance on the job to resist claims..."

Trial courts should calculate back pay "from the date of the unlawful discharge to the date the new information was discovered." Extra relief can be ordered if the

circumstances warrant it, and the court “can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.” An absolute rule barring back pay would “undermine” the purposes of laws prohibiting employer discrimination. [McKennon v. Nashville Banner](#), # 93-1543, 513 U.S. 352 (1995).

## 5. Notes:

1. See EEOC Compliance Manual, Section 8: [Retaliation](#)
2. “The intended beneficiaries of the anti-retaliation provision of § [2000e-3\(a\)](#) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation.” [Thompson v. N. Am. Stainless](#), #07-5040, 2009 U.S. App. Lexis 12100 (en banc 6th Cir)(termination of the complainant’s fiancée). Also see, [Fogleman v. Mercy Hosp.](#), #00-2263, 283 F.3d 561 (3d Cir. 2002) (termination of the complainant’s son), [Holt v. JTM Industries](#), 89 F.3d 1224 (5th Cir. 1996)(alleged spousal discrimination) and [Smith v. Riceland Foods](#), 151 F.3d 813 (8th Cir. 1998)(assisted his girlfriend in filing a complaint).
3. Verdict reported at 44 (2182) G.E.R.R. (BNA) 1220. Prior ruling at 2006 U.S. Dist. Lexis 69044; subsequent rulings at 473 F. Supp.2d 1286 and 473 F. Supp.2d 1292 (S.D. Fla.).

## 6. References:

*AELE* [Specimen Retaliation Policy](#)

### *Agency policies:*

Charlotte-Mecklenburg Police Dept., [Harassment and Discrimination Policy #300-017](#)

Los Angeles Police Dept. Manual, [Policy Prohibiting Retaliation §272](#)

Orlando, Police Dept., [Harassment in the Workplace Policy #1608.0](#)

Tulsa Police Dept., [Prohibition Against Retaliation Policy #31-136C](#)

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The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace, 59 Fla. L. Rev. 931 (2007).

The Employer Strikes Back: The Case for a Broad Reading of Title VII's Bar on Retaliation, 2006 Utah L. Rev. 505 (2006).

Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases, 81 Notre Dame L. Rev. 1629 (2006).

"Lie or Lose Your Job!" Protecting a Public Employee's First Amendment Right to Testify Truthfully, 29 Hamline L. Rev. 413 (2006).

Put on Your Coat, a Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims, 83 Denv. U.L. Rev. 867 (2006).

Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should be Actionable Wrongdoing?, 56 Okla. L. Rev. 623 (2003).

Silencing Government Employee Whistleblowers in the Name of "Efficiency," 23 Ohio N.U.L. Rev. 17 (1996).

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