



DEPARTMENT OF VETERANS AFFAIRS  
ASSISTANT SECRETARY FOR HUMAN RESOURCES AND ADMINISTRATION  
WASHINGTON DC 20420  
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MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER  
KEY OFFICIALS, AND FIELD FACILITY DIRECTORS

SUBJECT: Prohibited Discrimination: Retaliation

The Department of Veterans Affairs (VA) is strongly committed to equal employment opportunity (EEO) and diversity in the VA workplace. To this end, on June 13, 2011, Secretary Shinseki issued a Policy Statement to all employees summarizing VA's EEO, Diversity, and No FEAR Policies. The Statement clearly articulates that all forms of prohibited discrimination, including retaliation, would not be tolerated in VA.

Recent EEO reports have indicated that retaliation/reprisal continues to be the most prevalent basis upon which discrimination complaints are filed in VA. I want to take this opportunity to reaffirm VA's policy and remind managers and supervisors of their obligations to maintain an environment free from discrimination and reprisal.

In the area of employment discrimination, retaliation or reprisal is defined as any negative treatment or adverse action imposed upon an individual for engaging in protected activity, which includes filing a charge of discrimination, participating in an employment discrimination proceeding, or otherwise opposing unlawful discrimination. This includes any behavior that may reasonably dissuade someone from exercising his or her rights granted by the applicable civil rights laws.

Managers and supervisors bear a special responsibility and legal obligation to ensure that they don't engage in or tolerate retaliation in the workplace. To assist you with gaining a better understanding in this area, please see the attached Frequently Asked Questions on what constitutes unlawful retaliation or reprisal. Supervisors and managers are encouraged to contact their local EEO Manager, the Office of Resolution Management, or the Office of General Counsel for more guidance on this topic. Additionally, the Office of Diversity and Inclusion provides training and consultation in the area of EEO and diversity.

As we continue to transform VA into a high performing 21<sup>st</sup> century organization, it is imperative that we cultivate a fair and inclusive work environment that protects the rights of all individuals in the workplace. Please ensure that all managers and supervisors are informed about this and understand their responsibilities. Thank you for your support.

  
John U. Sepúlveda

Attachments

## Frequently Asked Questions Retaliation/Reprisal

The Equal Employment Opportunity Commission (EEOC) reports that retaliation is the most frequently alleged basis of discrimination in the Federal government. An employer is prohibited from taking an adverse action based on an employee's prior EEO activity. What lessons can VA managers learn from recent EEOC decisions to prevent findings of discrimination? The scenarios below reflect cases where VA was found to have committed a per se violation or retaliated against an employee. Per se retaliation/reprisal is an automatic violation of the law against reprisal that does not require evidence of an "adverse action." Per se violations occur when management officials make negative comments or take action against an individual who participates in the EEO process in any capacity. The responses to the following scenarios can be used as a valuable tool to assist managers in preventing and eliminating retaliation/reprisal and other forms of discrimination in the workplace.

**1. I was in the midst of approving the reassignment of an employee to a different position when I received a call from an EEO counselor indicating that the employee had initiated an EEO complaint against me. I am not sure what the complaint is about, so I will deny the reassignment until I learn what the complaint is about because I do not want it to appear that I am moving her because she has filed an EEO complaint. *Was this the right thing to do?***

Delaying actions after an employee initiates an EEO complaint can be viewed as retaliation/reprisal. Managers should always ask themselves "Would I take this course of action if the employee did not have a complaint?" If the answer is no, then the action is not advisable, as it sends a message that because an employee used the EEO process, management may take a retaliatory action against them. The motivation to take or not to take an action based on an employee's participation in the EEO process constitutes prohibited retaliation/reprisal in violation of Title VII of the Civil Rights Act.

Provisions of Title VII of the Civil Rights Act that govern retaliation/reprisal are broad and make discrimination against an individual because of his or her protected EEO activity, unlawful. These provisions prohibit any discrimination that is reasonably likely to deter a complainant from participating in protected EEO activity.

**2. Carol has filed an EEO complaint and the case is scheduled for a hearing. She alleges that I discriminated against her when she was placed on absent without leave (AWOL). I just learned that Carol is going to call Donna as a witness. I hired Donna a couple of months ago; she is a recent college graduate and has no clue about what goes on in the Federal workplace. *Is it ok for me to warn Donna that Carol is a troublemaker and that she "crossed the line" when she filed her complaint?***

It is always inappropriate (and illegal!) for a supervisor or other VA management officials to dissuade an employee from participating in the EEO process, including testifying for, or serving as a representative on behalf of a complainant. It is also illegal for VA management officials to suggest or infer that an employee who files an EEO complaint is a "troublemaker".

Witnesses who testify in EEO hearings are protected from retaliation/reprisal by VA management officials. Depending on the circumstances, a potential witness may also be protected if she is the target of an adverse action by her supervisor or other management official as a result of being identified as a potential witness. Targeting can take many forms including issuing a letter of warning, lowering a performance evaluation, denying a leave request, or non-selection for promotion.

**3. I was on a selection panel for a motor vehicle operator position. I attended a meeting with Human Resource officials regarding the selection process where the applicant's prior EEO activity was disclosed as well as the qualifications of both candidates. The panel found both candidates to have similar qualifications; however, not all members agreed on what type of experience was the most valuable and gave credit to each candidate using different job experiences. The panel also discussed their concern that one of the employees had a prior history of filing EEO complaints which could lead to future complaints. Therefore, the other candidate was selected. *Was it appropriate to discuss the employee's prior EEO activity while determining the best applicant for the position?***

An individual's prior EEO activity must never be discussed or considered when determining the best qualified candidate for a position. In essence, an individual's EEO activity should not be shared at all during the selection process. Selections must be based on merit principles; a review of the qualifications required for the position, and each candidate's ability to meet those qualifications as evidenced by their work history. The Civil Service Reform Act (CSRA), codified (5 U.S.C. Section 2301) the basic merit principles governing Federal personnel management. These principles specify that selection and promotion should be based solely on merit, after fair and open competition.

Further, trying to justify a selection decision by simply stating that the selectee was "better qualified" absent a clear and specific explanation may result in a finding of discrimination, particularly, when it appears, at least on paper, that the candidate that was not selected actually had superior qualifications. For example, management should be able to articulate what skills, abilities, and experience the selectee had to make them better qualified to perform the duties of the position. An inference of retaliation/reprisal arises when there is proof that the protected EEO activity and the adverse action taken against the employee are related. This inference may arise even if a significant amount of time has elapsed between the protected activity and the adverse action if there is other evidence that points to retaliation/reprisal. Even if management produces evidence of a legitimate, nondiscriminatory reason for the action at issue, a violation

could still be found if this explanation is a pretext designed to hide the true retaliatory motive.

**4. Steve, one of my subordinates, keeps filing EEO complaints. He is always spending time in Human Resources, but otherwise is an excellent employee. I want to put something in his performance evaluation to reflect how much time he is spending on his EEO complaints. *Can I do this?***

An employee's EEO activity has no relationship to his work performance. Statements about EEO activity may constitute per se retaliation/reprisal and must not be included in VA performance evaluations. Likewise, it is illegal to provide an employment reference that identifies, discusses, or offers an opinion about an individual's EEO activity.

VA employees are entitled to a "reasonable amount of official time" to pursue their EEO complaints. An employee who serves as a complainant's representative is also entitled to official time. For further guidance about what constitutes a "reasonable amount of official time" contact your local EEO Program Manager and/or Regional Counsel.

**5. In October 2009, Marcus, a Food Service Leader, who is one of my employees, participated in EEO activity. He had expressed his concern to me that there was a difference in assignments given to older and younger employees. In June 2010, Marcus contacted an EEO counselor and alleged that I assigned him less desirable work more often than his co-workers in retaliation/reprisal for his prior EEO activity in October 2009 and contrary to the agency's policy. I attest that Marcus' assignments were made for business related purposes. *Is there something wrong with using my own judgment rather than relying on agency policies?***

Management's reason was found to be pretextual because the employee's assignments violated agency policy. Pretext means that the explanation given by management is just an excuse and not the real reason for the action taken.

It is important for management officials to follow agency policy and not deviate from it when carrying out personnel actions without justifiable and credible reasons. It may raise red flags, if an EEO complaint is filed, particularly, by an employee who has previously filed. In this case, the manager did not specifically answer why Marcus received more of the less desirable jobs; more to the point, how did this turn of events relate and/or impact the business that led to Marcus' receipt of more of the less desirable assignments? Management must also be able to articulate a legitimate non-discriminatory reason (i.e., state the business case) for its actions. It is possible that if management had provided a detailed reason explaining the deviation of assignments from the usual policy, the result may have been different. In any event, this situation highlights the fact that managers need to be careful not to depart from normal procedures.

Note: Failure to follow agency's procedures led to this finding of retaliatory discrimination. Many employees, after having filed a discrimination complaint almost always believe that any negative or suspect action taken against them afterwards is retaliatory.

**6. Last month I removed Tina during her probationary period and she filed a discrimination complaint against me. Jack is one of my subordinates and Tina's friend. I expect loyalty from my staff and I don't want Jack helping Tina with her complaint. *Since Jack works for me, can I tell him not to assist Tina with her complaint?***

Third parties participating in the EEO process are protected from retaliation/reprisal even if they do not feel that they are personally discriminated against. Participation may include assisting an aggrieved employee with her complaint by participating in an investigation or providing a written or oral statement in support of the employee. Thus, it is illegal for a VA supervisor or other management official to advise subordinate staff that they cannot assist a co-worker with her complaint.

However, there are VA policies governing the use of official time for such purposes. To access the "Official Time" guidance, please visit:

<http://vaww4.va.gov/orm/departments/LR/ormlr/toolboxes/docs/OTFAQS.pdf>. VA supervisors and management officials must not discuss an employee's ongoing EEO activity with subordinate staff, unless the staff member is involved in processing, investigating, mediating, or litigating the complaint. Management officials must cooperate in the EEO process including investigations. Failure to cooperate in an EEO investigation may lead to disciplinary action, up to and including removal.

**7. If an employee filed a previous EEO complaint against me, and subsequently, complains to me that another co-worker is telling insensitive jokes in his/her presence, and I don't think the jokes are insensitive at all. *What should I do since the jokes were not directed at the employee who complained?***

Whether or not you believe the jokes were insensitive, management has a responsibility to immediately address the issue. Management is under an obligation to do whatever is necessary to end harassment and prevent misconduct from recurring regardless of whether or not the employee who raised the concern has previously filed an EEO complaint, or whether or not management regards the employee as overly sensitive. Management can be found liable for retaliation/reprisal if they fail to exercise reasonable care to prevent retaliatory harassment. Incidents of harassment must be addressed promptly. Failure to take corrective measures in a timely fashion can result in a finding of discrimination, in so far that acting too late is the equivalent of not acting at all. It is advisable that management meet with the employee and share the conclusion after looking into the matter. VA managers and supervisors have a special responsibility in maintaining a work environment free from discrimination and harassment. All VA managers and supervisors are required to complete mandatory training in EEO,

Diversity, and Conflict Management every two years. This training can be found using the Talent Management System at <https://www.tms.va.gov/plateau/user/login.jsp>. If you complete the training using this method, it satisfies the every two year requirement.

**8. Sam went to the union alleging that Nancy was sexually harassing him. I supervise both Sam and Nancy. I think Sam is making this whole thing up. I want to tell the union that Sam better be telling the truth, because if he is not, I am going to take disciplinary action against him. *Should I do this?***

It is illegal for VA supervisors and management officials to make statements or engage in conduct that might cause an employee to refrain from engaging in protected EEO activity. Such statements or actions constitute "per se retaliation/reprisal" and are an automatic violation of anti-discrimination laws. A finding of discrimination involving "per se retaliation/reprisal" does not require evidence that the VA discriminated against the employee. When VA supervisors and management officials engage in "per se retaliation/reprisal, by making statements that intimidate or threaten disciplinary action, it has a chilling effect on employees' rights to participate in the EEO process or voice opposition to discriminatory practices. The EEOC has determined that retaliation/reprisal harms the public interest by deterring others from filing complaints.

**9. An employee filed a prior EEO complaint against me for counseling her regarding her time and attendance. Shortly thereafter, she was issued a letter of admonishment suspending her supervisory duties pending an investigation into patient abuse. Although the investigation did not reveal patient abuse occurred, I did not remove the suspension until six months later, because I forgot. *Should I have removed the suspension immediately upon learning of the results of the investigation since that is the policy of the department?***

There was no justifiable reason to continue to suspend the employee's supervisory duties after it was learned that no patient abuse occurred. The purpose of an Administrative Investigation Board is to determine whether or not misconduct occurred through the examination of relevant evidence, to include both testimonial and documentary. The evidence compiled during the investigation can be used to form the foundation of disciplinary and/or adverse action if it is discovered that misconduct has been committed. If, alternatively, no misconduct is evident, no further action need be taken against an employee, particularly when to do so, would be contrary to policy and common practice.

Managers should be mindful that employees are very sensitive to any actions management takes against them, after they have filed an EEO complaint. It is always a good practice to be certain that actions taken against an employee after an EEO complaint has been filed, is warranted and the complainant is treated the same as any other employee in a similar situation.

**10. Kevin filed a complaint saying that I discriminated against him because of his religion. I am personally offended by his statements. Can I tell him how I feel?**

No supervisor or manager likes when an EEO complaint is filed identifying him/her as the individual responsible for the action alleged to have been discriminatory. You may feel offended, angry, or disappointed that a member of your staff would take such an action. However, it is never appropriate for VA managers and supervisors to publicly express hostility toward the EEO complaint process or the employee who filed the complaint. Such statements often are found to be "per se retaliation/reprisal" as discussed above.

If you feel personally offended or hurt that a complaint has been filed against you, discuss your feelings with the EEO Program Manager or Regional Counsel.

**11. An employee in my section alleges I retaliated against her when I sent an email to all of the employees in my department asking them for statements I could use to defend myself against an EEO complaint she had filed against me. Were my actions inappropriate?**

Anti-retaliation/reprisal provisions protect individuals from any actions that would likely discourage a reasonable person from participating in the EEO process. These actions are not limited to actions that are typically considered to be adverse in nature, such as disciplinary or performance based actions. They may take the form of any management decisions or actions that interfere with an employee's ability to pursue a complaint.

Managers must avoid creating an atmosphere in which employees are reluctant to exercise their EEO rights for fear of retaliation.

After reviewing the facets of this case, management's e-mail to several employees in the section was the type of conduct reasonably likely to deter and dissuade individuals from engaging in EEO protected activity. Therefore, this action constituted prohibited reprisal discrimination.

**12. An employee filed an EEO complaint against me and several months later, submitted an untimely leave request for 40 hours. The leave request was submitted two days before the leave was to begin. In accordance to the leave policy, employees are to request leave at least two weeks in advance to ensure there is proper staff coverage and pending projects are completed. I have held all employees accountable for following this procedure. I met with the employee to explain that her leave is denied because she failed to follow proper leave procedures and her request conflicts with the second extension granted to complete the John Doe project. The employee was dissatisfied with my decision and took the leave anyway. Upon her return, I issued her a letter of admonishment, which disclosed that she was carried in an absent without leave status, because she was AWOL. The employee said that she did not agree with the admonishment. She believed that I was retaliating against her, because she**

**previously filed an EEO complaint against me. *Should I have issued her the letter of admonishment or ignored the fact that she took the leave without approval and not have disciplined her for fear of perceived retaliation?***

Consistent with a manager or supervisors role and responsibilities, management should not avoid taking appropriate corrective action(s) against employees who have filed previous EEO complaints against them, if there is a legitimate, lawful, objective reason for taking such action.

To avoid the appearance of giving preferential treatment, management has an obligation to enforce policies and procedures equitably. By enforcing employees to adhere to leave policies, it helps managers and supervisors better administer the workload to prevent undue hardship on the organization and other employees.

**13. Next month I will become the Director of the “Any Town USA, VA Medical Center.” This is my first supervisory assignment and I want to make a difference. Everyone knows that this facility is dysfunctional and has had a lot of EEO activity during the past three years. I am holding an “All Hands” meeting when I arrive. *Can I tell employees that we need to reduce our EEO complaints, if we ever want to win an award for organizational excellence?***

When VA managers and supervisors publicly discuss the EEO process, their focus should be on their strong commitment to equal employment opportunity, diversity and inclusion, and workplace dispute resolution. Every supervisor and manager bears a special responsibility to ensure that discrimination is not tolerated in VA and that diversity is valued.

On an annual basis, you and your staff should review VA’s workplace policies dealing with EEO, diversity and inclusion, and discuss the expectations of these policies. If you need additional assistance in facilitating such a discussion, contact your local EEO Program Manager.