



DEPARTMENT OF VETERANS AFFAIRS
Assistant Secretary for Human Resources and Administration
Washington DC 20420

JAN - 8 2016

**UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS,
AND FIELD FACILITY DIRECTORS**

SUBJECT: Prohibited Discrimination: Retaliation (VAIQ 7661248)

The Department of Veterans Affairs (VA) is strongly committed to equal employment opportunity (EEO) and diversity in the VA workplace. On April 20, 2015, Secretary McDonald issued a policy statement to all employees summarizing VA's EEO, diversity, No FEAR and whistleblower policies. The policy statement clearly articulates that all forms of prohibited discrimination, including retaliation, would not be tolerated in VA.

Recent EEO reports indicate that retaliation 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 retaliation.

In the area of employment discrimination, retaliation is defined as any negative treatment or adverse action imposed upon an individual for engaging in protected activity, which includes filing a complaint 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 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 in better understanding this issue, I am attaching the Retaliation Guide: Lessons for Managers, which explains in full detail what constitutes unlawful retaliation. It also offers lessons from VA cases that I encourage all managers to review. All supervisors and managers may also contact the Office of Resolution Management for more guidance on this topic.

When we remove the fear of retaliation, the rights of all individuals in the workplace are better protected. By cultivating a fair and inclusive work environment, we align squarely within VA's ICARE values. Please ensure that all managers and supervisors are informed about this and understand their responsibilities. Thank you for your support.


Gina S. Farrisee

Attachment

RETALIATION GUIDE: LESSONS FOR MANAGERS

Over the past decade, the Equal Employment Opportunity Commission (EEOC) has reported that retaliation is the most frequently alleged basis of discrimination in the Federal workplace and the most common discrimination finding in Federal sector EEO cases. EEOC defines retaliation as any adverse treatment or action that is based on a retaliatory motive, and is reasonably likely to deter a Complainant or others from engaging in protected EEO activity. Retaliation includes prohibited acts against those who engage in protected EEO activity or oppose unlawful discrimination. A manager may NOT take adverse action or delay favorable action based on an employee's prior or current EEO activity.

This Guide follows the basic analysis employed by EEOC for claims of prohibited retaliation using actual cases where VA was found to have retaliated against an employee. By utilizing this process, managers can identify situations which could lead to a claim of retaliation and adjust their actions accordingly. This Guide is divided into five sections: 1) requirements needed to establish an initial (*prima facie*) case of retaliation; 2) an overview of the Agency's burden of production to articulate some legitimate, nondiscriminatory reason for its actions; 3) a brief summary of the Complainant's burden of showing that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the Complainant's protected class, that management has discriminated against the Complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities (pretext); 4) a non-exhaustive list of Agency actions or comments which, on their face, discourage an employee from participating in the EEO process and violate the letter and spirit of EEOC's regulations (*per se* retaliation); and, 5) more examples of findings of discrimination from VA case files. The cases used offer scenarios and lessons that may help managers reduce claims of retaliation in VA.

1) *Prima Facie* Case of Retaliation ("At First Sight"). Establishing a *prima facie* case of retaliation means that, at first sight, the Complainant meets the legal elements for a claim of retaliation. This claim may be disproved or rebutted, but establishing a *prima facie* case is the first step for a Complainant to show that s/he was subjected to unlawful discrimination because s/he engaged in prior EEO activity or opposed any practice made unlawful under employment discrimination statutes. A Complainant may establish a *prima facie* case of reprisal by showing that: (1) he or she engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment.

a. Engaging in Protected EEO Activity

Lesson: Management officials should remember that the prohibition on retaliation extends beyond just the Complainant filing an EEO claim.

Background: A VA employee notified his supervisor about offensive remarks that another male co-worker made to a female co-worker, which were of a sexual nature. The employee alleged that management began subjecting him to a pattern of harassment after this notification, and he subsequently filed a complaint of discrimination alleging retaliation for prior EEO activity.

Outcome: The EEOC found the employee engaged in protected EEO activity when he complained to his supervisor about remarks that were potentially offensive to another.

Explanation: Protected EEO activities include opposing an unlawful employment practice; filing or threatening to file a complaint; complaining about alleged employment discrimination; refusing to obey an order due to a belief that it is discriminatory; requesting disability or religious accommodations; testifying, assisting, or participating in any manner in the EEO counseling or complaint process, an EEO investigation, or an EEO hearing (i.e., "opposition" or "participation"). However, being named as a Responsible Management Official in a complaint does not constitute protected EEO activity.

- b. **Materially Adverse Actions** (employer actions which are harmful to the point that they might dissuade a reasonable employee from making or supporting a charge of discrimination)

Lesson: When implementing materially adverse actions, management officials must ensure that the actions are not based on a retaliatory motive.

Background: An employee of VA alleged that the Agency subjected him to discrimination based on race, national origin, disability (physical and mental), and in retaliation for prior EEO activity. He alleged the Agency refused to provide: (a) the necessary training for his job; (b) a requested mouse pad; or (c) an ergonomic chair in a timely manner. Further, he claimed a comment was made that he used his disability "as a crutch."

Outcome: The court found that the employee's retaliation claim failed. He did not allege facts that showed a materially adverse employment action was taken in retaliation for EEO activity. Prohibitions against retaliation do not immunize employees from petty slights or minor annoyances that often occur in the workplace. The Complainant failed to establish that management retaliated against him after he filed his EEO complaint.

Explanation: Where no materially adverse action is taken by a supervisor, an employee will not be able to demonstrate a "*prima facie*" case of retaliation (*But see* Section 4 below).

- c. **A Nexus between Adverse Treatment and Protected EEO Activity**

Lesson: Management officials should be aware that taking adverse action shortly after an employee engages in protected activity may establish a causal connection and inference of retaliation.

Background: A VA employee was hired subject to a one year probationary period. The employee injured his knee two months after he began work and was subsequently on medical leave for approximately three months. Prior to injuring his knee and going out on medical leave, the employee exhibited performance problems, and these problems continued after his return. Despite regular verbal counseling, the employee's performance did not improve and a formal written counseling was issued. The employee filed an EEO complaint after receiving the written counseling. His employment was later terminated for unsatisfactory performance, and he alleged it was in retaliation for filing his EEO complaint.

Outcome: The employee's retaliation claim failed because he did not demonstrate a nexus between his protected activity and the termination of his employment. The only evidence he offered in support of a causal connection was the timing of approximately four months between the date that he initiated informal EEO counseling, and the subsequent termination of his employment.

Explanation: There is no set period of time in which EEOC will infer a retaliatory motive. Cases are reviewed on an individual basis. However, EEOC's trend in recent years has been to significantly decrease the time interval that will support an inference of retaliation in the absence of any other evidence.

2) Legitimate Non-Discriminatory Purpose. Once a Complainant establishes a *prima facie* case of retaliation, it is the Agency's burden to articulate a legitimate, nondiscriminatory reason for its actions.

***Lesson:* If management officials cannot articulate a legitimate, non-discriminatory reason for an action, they should reconsider taking the action.**

Background: A VA employee alleged that the Agency subjected him to discrimination based on retaliation. He claimed a refusal to transfer him was motivated by retaliatory animus related to his engagement in prior, protected EEO activities.

Outcome: There was no evidence that the refusal to permit a transfer was motivated by the employee's engagement in prior, protected EEO activities. The transfer was ultimately delayed, but the Agency articulated a legitimate, nondiscriminatory reason for the delay by explaining that there was a hiring freeze.

Explanation: If a *prima facie* case of retaliation is established, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions.

3) Pretext. If the Agency provides a legitimate, nondiscriminatory reason for its actions, a Complainant must prove that the Agency's explanation was a pretext for retaliation. Establishing pretext means proving the Agency's explanation is without foundation, or, if true, is not the actual reason for the Agency's action

Lesson: When management officials provide a legitimate, non-discriminatory reason for taking a certain action, they should ensure there is no other purpose for the action and provide the justification employed.

Background: A VA employee alleged he was subjected to retaliation when he was charged with "Absent without Leave" (AWOL) for sick leave which had been approved. The employee alleged the AWOL charge was motivated by retaliatory animus due to his prior EEO activity.

Outcome: Noting the entire record reflected conflicting and inconsistent testimony by VA managers, the EEOC found the Agency's reasons for charging the employee with AWOL were not credible.

Explanation: A Complainant can demonstrate pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate, non-discriminatory reasons for an action that a reasonable fact finder could rationally find unworthy of credence.

4) **Per Se Retaliation ("By Itself").** Establishing per se retaliation means that, by itself, a certain action is deemed to interfere with the EEO process, without the need to prove anything further. While a *prima facie* case of retaliation generally requires a materially adverse action, this is not the case for *per se* retaliation. A Complainant may establish *per se* retaliation by showing that management made comments or engaged in conduct that intimidates or interferes with an employee's EEO activity in any manner.

a. **Non-management Employee Comments**

Lesson: Employees at all levels should understand that EEO activity is acceptable in the federal workplace and that conduct, comments, and actions to the contrary may be in violation of retaliation statutes. Management officials should carefully consider whether or not a situation might possibly deter a reasonable person from engaging in the EEO process.

Background: A VA employee alleged he was subjected to retaliation for EEO activity when an EEO counselor told him that reopening his claim might hurt his chances of obtaining a job. The complaint was subsequently dismissed on procedural grounds.

Outcome: EEOC ruled that the Complainant stated a claim of retaliation, and that the VA improperly dismissed the claim.

Explanation: Conduct, comments, and actions that are reasonably likely to deter employees from engaging in EEO activity, regardless of the source, are *per se* violations of retaliation statutes. *Per se* retaliation can be proven without any evidence of retaliatory intent. Agency management should encourage/allow EEO participation and make every effort to avoid conduct that would create a chilling effect.

b. Management Comments to a Complainant

Lesson: Management officials should not express disapproval of an employee's involvement in the EEO process. When allegations of discrimination are directed at a management official, s/he may be offended or insulted but should not make any comments that are likely to have a chilling affect and deter employees from fully exercising their EEO rights.

Background: A VA employee/Union Steward contacted an EEO Counselor regarding an allegation of sexual harassment. The EEO Counselor immediately contacted the Responsible Management Official (RMO) and told him about the Complainant's allegations. Several days later, the RMO contacted the local Union President about the possibility of utilizing mediation to resolve the Complainant's claim. The RMO, however, went one step further and told the Union President that if the Complainant was not telling the truth, he could be subject to disciplinary action. The Union President relayed the RMO's message to the Complainant.

Outcome: Although the RMO testified that his remarks were not intended as a threat against the Complainant, VA's Office of Employment Discrimination Complaint Adjudication (OEDCA) found that the RMO had engaged in Reprisal *Per Se*.

Explanation: When a supervisor makes comments that intimidate or interfere with an employee's EEO activity in any manner, the comments may constitute retaliation *per se*.

c. Managerial Communications with Employees

Lesson: Management officials should view their actions in response to an employee's EEO activity through the lens of their employees. Where an action might interfere with or deter an employee from participating in later EEO activities, a manager should reassess that action.

Background: A VA Police Chief was the subject of two EEO complaints based on comments he made during meetings. In the first complaint, the Police Chief made statements that he did not care about the EEO process, that he encouraged staff to bring EEO complaints directly to him rather than using the EEO process, that he would not settle EEO complaints, and that he would "fight EEO complaints tooth and nail." In the second complaint, another employee alleged that the same Police Chief made the following statements during a staff meeting: "I have yet to see a valid Equal Employment Opportunity complaint, and if I did I would act promptly, but I see many EEO complaints started because of a lack of character;" "I am very transparent and would like to place every complaint on the board as well as every good comment;" and "There are too many rumors floating about EEO complaints . . . [I]t would be good for everyone to see what complaints were being made by whom and what the outcome would be".

Outcome: OEDCA found in both complaints that the Police Chief had engaged in reprisal *per se* because his comments expressed hostility toward the EEO process and would likely deter protected activity from employees under his supervision. Moreover,

his statements violated the letter and spirit of EEO law, which requires agencies to promote and support the full realization of equal employment opportunity in the workplace.

Explanation: Statutory retaliation clauses prohibit any adverse treatment that is likely to deter the Complainant or others from engaging in protected EEO activity.

d. Supervisory Actions

Lesson: Management officials should consider the impact of seemingly unrelated policies and their potential to interfere with an employee's protected EEO activity. Where a policy potentially conflicts with an employee's involvement in the EEO process, it should be brought to the attention of senior managers for review.

Background: A VA employee alleged, in part, that she was subjected to discrimination when she was issued a written letter of counseling for using an official Agency envelope to mail correspondence to her EEO representative. The Agency characterized the Complainant's correspondence with her EEO representative as a personal matter and against Agency policy prohibiting the personal use of office materials.

Outcome: EEOC concluded that correspondence relating to pending EEO matters is different from the type of examples cited in policy. EEO correspondence is part of the procedures that the Agency uses to administer the EEO process. EEOC further noted that employees can take official time to participate in the EEO process, and Agency equipment can be used for EEO matters, within certain limits. EEOC also found it was reasonable for the Complainant to mail her EEO correspondence using the Agency's business envelope. Accordingly, it concluded that the Agency's decision to counsel the employee for her participation in the EEO process was a *per se* violation.

Explanation: An employee is entitled to reasonable use of Agency materials and equipment when the Agency grants the employee official time – in accordance with applicable EEOC policies, procedures, and regulations – to work on EEO complaints. Reprimanding an employee for exercising a legitimate method of corresponding with her EEO representative interferes with protected EEO activity and is reasonably likely to deter EEO activity, amounting to a *per se* violation of anti-retaliation regulations.

5) More Examples of VA Findings of Discrimination

- a. During a selection panel meeting, the applicants' prior EEO activity was discussed. While several candidates had similar qualifications, the panel decided to select the candidate who had not engaged in prior EEO activity. Is it appropriate to discuss prior EEO activity while determining the best applicant?

Response: An individual's EEO activity should not be shared at all during the selection process. Selections must be based solely on merit, after fair and open competition.

- b. Steve keeps filing EEO complaints. He spends a lot of time in Human Resources, but, otherwise, he's an excellent employee. Can something be included in his performance evaluation to reflect how much time he spends on his EEO complaints?

Response: EEO activity has no relationship to work performance. Statements about EEO activity must never be included in performance evaluations. Additionally, VA employees are entitled to a "reasonable amount of official time" to pursue EEO complaints.

- c. When an EEO complaint is filed, supervisors often feel personally offended by the accusation. May a supervisor tell the employee how they feel?

Response: It is not appropriate for VA managers to express opposition toward the EEO process or an employee who filed an EEO complaint.

- d. Carol plans to call her co-worker, Donna, as a witness for her EEO complaint. Donna has only been with VA for a couple of months and is a recent college graduate. Is it OK to warn Donna that Carol is a troublemaker and "crossed the line" when she filed her complaint?

Response: Supervisors should never dissuade an employee from participating in the EEO process, and they must refrain from making any disparaging remarks about an employee's engagement in the EEO process.

- e. Tina's employment was terminated during her probationary period, and she subsequently filed an EEO complaint. Jack is another subordinate in the same unit and Tina's friend. Can Jack be told that he can't help Tina with her complaint?

Response: Participating in the EEO process may include participating in an investigation or providing a written or oral statement. A supervisor may not advise subordinate staff that they cannot assist a co-worker with an EEO complaint.

- f. Should a manager publicly express an interest in reducing the number of EEO complaints to his/her subordinates?

Response: When VA managers publicly discuss the EEO process, their focus should be on their strong commitment to equal employment opportunity, diversity and inclusion, and dispute resolution. On an annual basis, managers should review VA workplace policies with their staff. If any assistance is needed, a manager may contact his/her local EEO Program Manager.