

# After discipline, how should we respond to employee's retaliation claim?

**Q. We recently disciplined one of our employees for a handbook violation. She has since alleged that she was the victim of harassment. We are now facing a retaliation claim from this employee. How should we respond to such retaliation complaints?**

**A.** Retaliation claims are an undeniable fact of life for employers. However, smart employers can take steps to reduce the risks. Here some steps employers can take when facing a retaliation claim from a worker.

1. **Take control.** Once you recognize that protected activity may have occurred, HR should partner with management (and your attorney) to develop an individualized plan to minimize the risks.
2. **Create the proper working environment.** In a nondiscriminatory way, separate the complaining employee and the alleged discriminator/harasser.
3. **Create a direct line of communication** for the complaining party to voice future concerns. This ensures that future concerns are not lost in the bureaucratic morass.
4. **Check back** with the complaining employee.
5. **Fairly investigate** all concerns.
6. **Provide feedback** to the complaining employee, both in person and in writing.
7. **Control the message.** Train those who respond to the retaliation complaint how to communicate, especially in emails and memos. It is not just what you say, but how you say it. Establish a paper trail that demonstrates that you took employee concerns seriously, investigated them and fairly addressed them. All communications should demonstrate your fairness and respect for the complainant.
8. **Clean up the decision-making loop.** When possible, take the alleged discriminator/harasser out of the process of determining any action that could be deemed an adverse employment action.
9. **Be objective.** Don't evaluate subjectively or in a vacuum. Strive for objective performance metrics—for example, to document declining performance—but remember to apply the same metrics to the complainant's similarly situated co-workers. Then apply the same corrective measures to all.
10. **Take a deep breath.** In the immediate aftermath of a complaint or expression of concern, pause and reflect before implementing any decision that could be construed as an adverse employment action. A paper trail that accurately reflects that the employee has been given the benefit of the doubt will contribute mightily to a positive result.

Minimizing the risks of retaliation claims is more art than science. No template or "Top 10" list can guarantee a risk-proof outcome. It often comes down to choosing the lesser of the two evils.

Your best defense against retaliation claims is a process that marshals foresight, planning, a commitment to fairness and sensitivity, control of communication and common sense. Documentation is key. If done correctly, it will persuade the EEOC, judges and juries that you respected and protected the employee's right to complain.