

# Same Job, Different Office: Is That Retaliation?



The American workplace ... land of revenge.

For the past few years, the No. 1 employee charge filed with the EEOC hasn't been race, age or sex discrimination. It's been retaliation—employees complaining that they suffered some sort of “adverse action” (firing, demotion, etc.) because they complained about discrimination.

But take note: Some employees think that just because they've filed a complaint or lawsuit, anything negative that later happens to them **MUST** be retaliation.

That's just not true. As the EEOC has said, “adverse actions do not include petty slights and annoyances.” Consider this recent case—a real-life portrayal of [Milton's dilemma](#) in the cult-classic *Office Space*.

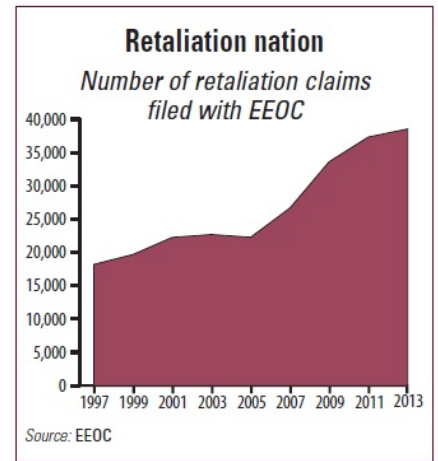
**Case in Point:** Richard brought a discrimination complaint against his employer, the U.S. State Department, and eventually settled the case out of court. Then, several years later, Richard's new supervisor moved his office to another floor in the same building.

Richard believed the office move was retaliation for his earlier discrimination lawsuit, so he brought a retaliation claim. The government countered by arguing that, while Richard was moved to another floor, his actual job duties never changed, nor did his pay or benefits.

Plus, there wasn't anything particularly negative about the new office—it was merely located on a different floor.

**Result:** The court tossed out Richard's case, saying employers are free to make reasonable office assignments. A new office location within the same building, the court said, isn't automatically an adverse employment action when nothing else about the job changed. Of course, moving an employee to a basement storage closet could be considered an adverse action. (*Higbie v. Kerry*, No. 3:11-CV-2636, ND TX, 2014)

## Three lessons learned ... without going to court



**1. Know what counts as 'retaliation.'** Retaliation is anything that would make a reasonable employee rethink having complained about alleged discrimination in the first place. The focus is on the so-called "reasonable employee," not the individual employee who has filed the retaliation lawsuit. It's an objective focus. See the [EEOC's definition](#).

You can still discipline complaining employees for legitimate performance and behavior issues. Just make sure you've taken the same actions with all employees. And document the reasons for your decisions.

**2. Watch managers' treatment of complainers.** It's more important than ever to treat all employees equally in day-to-day management and discipline. Remind supervisors to never try to "get back at" employees who complain about discrimination, safety or financial violations.

**3. Ask these two questions before handing down discipline** against employees who've voiced complaints (either formally or informally):

- **"Why am I taking this action now?"** Scrutinize the reason and timing of your action. Is there any connection to the person's complaint? If it smells even a bit like retaliation for the complaint, a jury could see it that way, too.
- **"Would I take this action with my best employee?"** If your answer is "no," you could be open to a retaliation charge. If your answer is "yes," make sure that you document the basis for your decision before proceeding.