

Beware retaliation against workers who testify

Employees who testify on behalf of co-workers before the EEOC or in subsequent litigation are protected from retaliation.

Be careful about how you treat employees following that kind of cooperation. A sudden emphasis on poor performance, for example, could be seen as retaliation.

That's especially true if the employee has worked for you for a long time without any prior poor performance or a history of disciplinary write-ups.

Recent case: Kelly had worked as a game warden for about 30 years without any performance or disciplinary problems. Then, while working with another game warden on patrol, he allegedly overheard a phone conversation between his colleague and their supervisor about a promotion that had just been denied. Kelly allegedly heard the supervisor tell the other game warden he had not been promoted because he had filed a prior EEOC complaint.

Kelly ended up testifying on behalf of the other game warden both before the EEOC and at trial. Soon, he found himself being written up for alleged misconduct. He was eventually discharged.

Kelly sued, alleging retaliation for assisting his fellow game warden in his discrimination claim.

The court said Kelly had a possible retaliation claim, even if some of the write-ups he received after he testified were actually valid. It noted that his 30-year untarnished employment history could be used as evidence that he had been targeted. The case now moves to trial. (*Newman v. Texas Parks and Wildlife Department*, SD TX, 2018)

Advice: Make sure someone reviews past disciplinary history before terminating an employee who recently testified for a co-worker.

Then, if that history is clear, get a detailed explanation from supervisors about why, suddenly, they are writing up the employee. If their explanation seems suspect, recommend against discipline.