

## How To Minimize Retaliation Claims During The Termination Process

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Last week, the EEOC recently released its [enforcement data for Fiscal Year 2015](#). Unsurprisingly, retaliation claims continue to rise and made up nearly 45 percent of all charges filed. This statistic is unsurprising given the relative ease it is for an employee to assert a claim. In most jurisdictions, the employee must only show he or she made a good faith complaint about an employment practice such as discrimination or harassment and, shortly thereafter, the employee suffered some form of adverse employment action such as a termination. Retaliation cases are more difficult for employers because of the “good faith complaint” standard – the employee only needs to demonstrate she reasonably believed she was being harassed or discriminated against because of a protected characteristic. The employee is not required to demonstrate the requisite elements of harassment or discrimination in order to proceed with a retaliation claim. Often times, we see retaliation claims brought following a termination and, unfortunately, employers face difficulties in defeating those claims because the termination process did not include a review of issues raised by the employee within the past few years. To minimize retaliation claims in connection with terminations, employers should consider examining:

- Has the employee raised a formal or informal complaint of discrimination or harassment? If so, when was the complaint raised?
  - The temporal proximity of the complaint and the termination is critical in defending against a retaliation complaint. Courts generally have held that when there is more than a year between the time of the complaint and the company’s decision to terminate, the less likely retaliation is a motivating factor for the decision.
- If the employee made a complaint (formal or informal), did the complaint involve one of the decision-makers recommending termination?
  - If the complaint involved one of the decision-makers, the employer should examine whether the individual recommending termination is motivated for reasons that may be perceived as retaliatory.
- Has the company terminated other employees who have not raised complaints for the same or similar reasons surrounding this termination?
  - Consistent treatment is key in defending against retaliation claims and, if there is a deviation from the employer’s practices, a justification needs to be proven.
- What do the documents look like?
  - So many times an employer proceeds with a termination for

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“poor performance” or “ongoing performance issues” when the documentation tells a different story. The more the documentation matches the employer’s stated reason for termination, the easier the defense of a retaliation case is.

By asking these questions and reviewing the documentation prior to termination, employers can potentially minimize retaliation claims and reduce the risk of becoming a growing statistic with the EEOC.