

# Strategies for Avoiding Employment Retaliation Claims

BY JOHN J. DAVIS

Massachusetts law prohibits employers from discriminating on the basis of race, color, religious creed, national origin, sex, sexual orientation, genetic information, ancestry, age or handicap. [M.G.L. Ch. 151B, Sect. 4] State law also prohibits “any person” (not merely a supervisor or employer) from taking adverse action against a person “because he has opposed any practices forbidden under [Chapter 151B] or because he has filed a complaint, testified or assisted in any proceeding under [Chapter 151B].” [M.G.L. Ch. 151B, Sect. 4(4)] Nor may “any person ... coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by this chapter.” [M.G.L. Ch. 151B, Sect. 4(4A)]

The effect of these anti-retaliation provisions can be measured, in part, by the increasing frequency with which they are used. More and more often, employees file retaliation claims in tandem with discrimination charges. The fact that case law establishes that a retaliation claim can survive even when the underlying discrimination charge lacks merit would seem to encourage retaliation claims.

Discrimination and retaliation claims can pose particular problems for employers when the claimant remains employed and active in the workplace, particularly if the claimant’s supervisor is also the subject of allegations of discrimination. Tensions



may be heightened to a point where the claimant regards every negative remark or event as retaliatory, and the supervisor may believe that everything she says or does may subject her to future liability.

## Making a Case

In order to recover for unlawful retaliation, an employee must show that (1) he engaged in protected conduct; (2) the respondent knew of the protected conduct and acted adversely against him; and (3) a causal connection existed between the protected conduct and the adverse action.

## Protected conduct

An employee acquires protection against retaliation by “oppos[ing] any practices” forbidden under Chapter 151B; by filing a complaint or by testifying or assisting in any proceeding under Chapter 151B; or by aiding or encouraging another person to enforce his or her rights under Chapter 151B. The Massachusetts Commission Against Discrimination, in its “Sexual Harassment in the Workplace Guidelines,” broadly interprets sections 4(4) and 4(4A)

of Chapter 151B to include as protected any employee who:

- Speaks to someone at the MCAD, Equal Employment Opportunity Commission or other civil rights or law enforcement agency
- Speaks to an attorney about the possibility of filing a charge of discrimination against his or her employer
- Speaks to an MCAD or EEOC investigator about a co-worker’s charge of discrimination against the employer
- Testifies in any proceeding about a charge of discrimination against the employer
- Complains to management or files an internal complaint of discrimination
- Asks a supervisor or co-worker to stop engaging in discriminatory conduct
- Cooperates in an internal investigation of discriminatory conduct
- Meets with co-workers to discuss how to end discrimination in the workplace

Protected status, however, is not necessarily bestowed upon every actor who engages in one or more of these activities. To examine the bona fides of a claimant’s protected conduct, courts have adopted three tests.

1. An employee must prove that she believed “reasonably and in good faith” that she (or her co-worker) was a victim of unlawful discrimination. In other words, a plaintiff cannot recover if no reasonable employee under the same circumstances would have believed her employer’s conduct constituted unlawful discrimination.
2. The plaintiff herself must hold the belief that her employer’s conduct was unlawful. >>

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3. The plaintiff must further prove “that she acted reasonably in response to her belief.”

Hence, even though the act of filing a complaint of discrimination is protected under Section 4(4), a jury may nonetheless find such conduct nothing more than a “smokescreen” to challenge a supervisor’s legitimate criticism, or an unreasonable “preemptive strike.”

### **Adverse action**

The second showing a retaliation plaintiff must make is that adverse action was taken against him by his employer after the plaintiff acquired protected status. Sections 4(4) and 4(4A) give limited guidance on what constitutes prohibited retaliation. Section 4(4) states only that an employer may not “discharge, expel or otherwise discriminate against” a protected employee, while Section 4(4A) prohibits coercion, intimidation, threats or interference with protected employees.

Fortunately, the courts have fleshed out this requirement. In *Gu v. Boston Police Department* [312 F. 3d 6 (1st Cir. 2002)], the federal appeals court found, “To be adverse, an action must materially change the conditions of plaintiffs’ employ.” The court quoted an earlier ruling, in *Hernandez-Torres v. Intercontinental Trading Inc.* [158 F. 3d 43 (1st Cir. 1998)]: “Material changes include ‘demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.’”

Thus, “subjective feelings of disappointment and disillusionment” will not suffice [*MacCormack v. Boston Edison Co.*, 423 Mass. 652 (1996)]; nor will “subjective and intangible impressions” [*Bain v. City of Springfield*, 424 Mass. 758 (1997)]. In *Bain*, the court also found that “vague and impressionistic elements have no place in defining the standards for legal intervention in the often fraught and delicate domain of personnel relations.”

Still, little things can add up. While a snub, stray remark or a certain look may not, by itself, qualify as an adverse action, the combination of such behaviors may create a hostile work environment. In *Clifton v. MBTA* [445 Mass. 611 (2005)], the Supreme Judicial Court acknowledged that retaliation can take the form of hostile or abusive workplace

treatment. “A hostile work environment may be manifested by a series of harassing acts that have been described as ‘pinpricks [that] only slowly add up to a wound,’” the court wrote. “One pinprick may not be actionable in itself, and its abusive nature may not be apparent except in retrospect, until the pain becomes intolerable.”

Finally, awareness of a plaintiff’s protected status is crucial to any showing of adverse action. In other words, an employer who materially changes the conditions of plaintiff’s employment without knowledge that the plaintiff has filed a charge of discrimination (or engaged in other protected conduct) cannot, as a matter of law, be held liable for retaliation.

In its guidelines, the MCAD states: “A complainant must show that her employer knew of her protected activity when it took adverse action. The MCAD has applied a ‘knew or should have known’ standard to impute knowledge of a complainant’s protected activity to her employer. Certain protected activity, such as filing a complaint with the MCAD, puts an employer on notice by its very nature. However, such notice would only be imputed to the employer in the presence of proof that the employer had received notice of the MCAD filing.”

### **Causal connection**

Recovery for retaliation under Chapter 151B, Section 4(4), requires proof of a causal connection between the protected conduct and the adverse action. As the Supreme Judicial Court stated in *Tate v. Department of Mental Health* [419 Mass. 356 (1995)], plaintiff’s participation in protected activity must be a “determinative factor” in the employer’s decision to take the adverse employment action. A highly relevant factor in this analysis is the proximity in time between the protected conduct and the adverse action. In *MacCormack v. Boston Edison*, the court ruled that the fact that one follows the other “is not sufficient to make out a causal link.” In *Mole v. University of Massachusetts* [442 Mass. 582 (2004)], however, the Supreme Judicial Court found that “if adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer’s becoming aware of the

employee’s protected activity, an inference of causation is permissible.” By the same token, the SJC found in *Mole* that as the elapsed time between the protected conduct and the adverse action becomes greater, “the inference [of causation] weakens and eventually collapses.”

## **Practical Tips**

Armed with an understanding of how an employee may frame a viable retaliation claim, it is important for employers to know ways that such claims can be avoided. Here are nine practical strategies:

### **1. Know the categories of potential retaliation claimants.**

To successfully avoid retaliation claims, an employer must know who belongs in the class of potential retaliation claimants. Clearly, an employee employed at the time of an unlawful action may have a right of recovery under Chapter 151B. Others who may have rights of recovery include:

- Former employees (e.g., a former employee who claims he was given a negative job reference in retaliation for protected conduct)
- Supervisors and co-workers (e.g., a supervisor who claims he was wrongfully disciplined for not discouraging a subordinate from filing a discrimination charge)
- Current employees mistakenly believed to have engaged in protected conduct
- Current employees who either encouraged or assisted the victim of discrimination in filing a complaint

### **2. Have good reasons for taking an adverse employment action.**

Protected status does not confer upon an employee immunity from discipline or from material changes in his conditions of employment, including termination. As a general rule, employers should always ensure that all grounds or reasons for disciplining an employee or for making changes in his conditions of employment are lawful and well-documented. This is especially important when the subject of the discipline has engaged in protected conduct. In that event, the decision maker(s) should confirm that the discipline or change in employment is for reasons unrelated to the employee’s protected conduct, and that such reasons are documented in departmental policies, department rules and regulations, the

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employee handbook, incident reports, citizen complaints, warnings, infractions, notes, memoranda, correspondence, statements, e-mails, photographs or drawings, prior disciplines, or other writings. (The more writings, the better.) In the event that it becomes necessary to discipline an employee with protected status, the employer should be certain to follow the steps of progressive discipline. Skipping a step may be considered retaliatory.

### **3. Use someone other than claimant's targeted supervisor to take an adverse employment action.**

In *Mole v. University of Massachusetts*, the Supreme Judicial Court offered the following guidance: "Despite a retaliatory or discriminatory motive on the part of a supervisor who recommends that some adverse action be taken against an employee, a third person's independent decision to take adverse action breaks the causal connection between the supervisor's retaliatory or discriminatory animus and the adverse action."

Whenever possible, the individual who ultimately takes the adverse action should be "independent" from the claimant's supervisor. Factors to aid in demonstrating such independence include giving the employee an opportunity to address the allegations in question, and proof that the decision maker was aware of the employee's view that his supervisor's recommendation for adverse action was retaliatory.

### **4. Investigate all claims of retaliation.**

Employers should investigate all complaints of unlawful conduct, including complaints of retaliation. Moreover, employees should be advised of the employer's policy to investigate all complaints and the employer's requirement that all employees participate in such investigations. At a minimum, any investigation should include:

- Assurances of confidentiality
- Contacting and interviewing the complaining employee
- Providing the complaining employee with the name of a specific experienced individual to whom she can bring future problems or concerns
- Interviews of other involved co-workers or supervisors
- Thorough documentation

- Recommendations and conclusions
- Follow-up

A track record of taking complaints seriously can prove a valuable tool in the defense of retaliation cases. When complaints of employees are expeditiously and judiciously addressed, they are much less likely to ripen into formal adversarial proceedings.

### **5. Maintain thorough and complete records.**

Documents can frequently make the difference in the defense of a retaliation case. Documentation of prior disciplines, reprimands, warnings, e-mails, negative performance evaluations, memoranda or other writings can prove invaluable in an effort to defeat the inference of a causal link between plaintiff's protected conduct and defendant's adverse employment action.

Helpful documentation includes:

- Records of past internal complaints, investigations and outcomes
- Records documenting sensitivity training or anger management instruction provided to employees and supervisors
- Internal sexual harassment and anti-discrimination policies, as well as signed employee acknowledgments confirming receipt of same
- Records documenting sexual harassment or anti-discrimination training provided to employees and supervisors
- E-mails or memoranda cautioning co-workers and supervisors against unlawful retaliatory actions or behaviors
- Reprimands, warnings or disciplinary action taken against those who engaged in unlawful retaliatory actions or behaviors

### **6. Don't know? Don't tell.**

Sometimes, what you don't know can't hurt you. Because proof of awareness of a plaintiff's protected status is crucial to any showing of adverse action, it can occasionally work to an employer's advantage if certain decision makers do not know that an employee filed a charge of discrimination or otherwise engaged in conduct protected under sections 4(4) or 4(4A) of Chapter 151B. This is not to suggest that those individuals personally accused of discrimination should be kept in the dark regarding an employee's charges. Yet, dissemination of infor-

mation concerning the identity of the claimant and the nature of her charges should be on a strict "need-to-know" basis. That way, future decisions regarding plaintiff's discipline and conditions of employment can be made (insofar as possible) untainted by knowledge that the employee is also a claimant. In simplest terms, don't publicize the claim any more than necessary.

### **7. Do know? Warn.**

When charges of discrimination are well-known (e.g., within a plaintiff's department or agency, or through media reports), the employer should remind supervisors about the law regarding retaliation and warn them that no retaliatory conduct or behaviors will be tolerated or permitted in the workplace. This can be accomplished by means of a letter, e-mail or memorandum, but it should be in writing. A written warning will serve the dual purposes of preventing retaliatory conduct by supervisors and co-workers, while also creating evidence for use by the employer against any future claims of retaliation.

### **8. Timing is everything, Part I.**

Recognizing that nearness in time between the protected conduct and adverse action is a key factor in a retaliation claim, an employer should consider the timing of any adverse actions. While a delay may not always be safe or feasible, there may be good reasons to take an adverse action later rather than sooner. For example, consultations with counsel, solicitation of input from upper-level management, or giving an employee a second chance can all lead to reasonable delays that, in the long run, may help to defeat an inference of causation.

### **9. Timing is everything, Part II.**

By the same token, many discrimination claimants are good and trusted employees. Thus, if a discrimination claimant merits a positive employment action (e.g., raise, promotion or favorable review), an employer should make certain that such action is not unreasonably delayed or postponed. Nothing defeats a retaliation claim better than evidence that a deserving employee was given positive feedback shortly after filing a claim of discrimination. ❀