



### RETALIATION: WHAT IS IT, WHAT IS IT NOT, AND WHAT DOES IT LOOK LIKE

Typically, when we think about retaliation in the legal context, we think about clear-cut REVENGE for speaking out against unlawful or discriminatory act. However, retaliation is never really that clear-cut, like everything in law and especially higher education, retaliation can be nuanced and very complicated. This Melissa Talks will cover the topic of retaliation—what is it, what is it not, and what does it look like?

What actions constitute retaliation will be fact-specific, but as a guiding factor, the Supreme Court has defined retaliation as **an intentional act in response to a protected action**. It carries with it the notion of “getting even.” As noted in a 2011 law review article: “Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider making a complaint in the future. Those with cause for complaining are frequently among the most vulnerable in an institution. Once they complain, they are labeled “trouble-makers.” Retaliation, and the fear of retaliation, becomes a potent weapon used to maintain the power structure within the institution.” Ivan E. Bodensteiner, *The Risk of Complaining Retaliation*, 38 J.C. & U.L. 1, 1 (2011).

This half hour will first define retaliation and then the discussion will be separated into two parts. First, we will talk about retaliation as it relates to student civil rights and second, we will talk about employee protections against retaliation.

Okay, let's jump in!

#### Retaliation Definition

Unlawful retaliation occurs when a person or an institution takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. Someone who complains about retaliation must be able to demonstrate evidence to meet the three elements of retaliation. These three elements are:

1. The individual or someone on behalf of the individual has or engaged in a **protected activity** or the District/college believed the individual or someone on behalf of the individual might engage in a protected activity in the future;
2. The individual experienced an **adverse action** caused by the recipient; and
3. There is some evidence of a **causal connection** between the protected activity and the adverse action.

### What is a protected activity?

A protected activity is any action taken to further a right guaranteed by policy and/or law or to express opposition to any practice made unlawful by policy and/or law. For example, an employee filing a discrimination complaint or a student participating as a witness in a Title IX hearing.

### What is an adverse action?

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the applicable statutes or regulations. Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.

### What constitutes a causal connection?

The evidence of a causal connection may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the District/college's treatment of the individual compared to similarly-situated individuals, or the District/college's deviation from established policies or practices.

### What happens if the elements are met?

If all the elements of retaliation are established, then the investigator considers whether the respondent (the person accused of engaging in retaliation) *has presented a facially legitimate, non-retaliatory reason for taking the adverse action*. If so, then the investigator considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

### When does the prohibition against retaliation apply?

ALWAYS. ALWAYS. ALWAYS. Even if the prohibition doesn't seem expressly outlined in policy, there is always the prohibition against retaliation under the law (state and/or federal).

## **PART ONE: Students**

The 2020 Title IX regulations include a provision expressly prohibiting retaliation. Title VI, ADA and Section 504 do not include an express provision prohibiting retaliation but the implementing regulations do include specific non-retaliation provisions. In addition, courts have held that various anti-discrimination statutes contain an implied cause of action for retaliation based on the general prohibition against intentional discrimination.

Retaliatory acts, which may include giving students failing grades, preventing students from participating in school activities, and threatening expulsion against any individual who exercises his or her rights under Title IX, Title VI, Section 504 of the Rehabilitation Act, and even the First Amendment are considered to be discrimination and are unlawful. Recipients of federal funds are prohibited from intimidating,

threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by these laws.

### What happens to a retaliation claim if the underlying complaint is found to be unsubstantiated?

A retaliation complaint may continue (and may be substantiated) even if the underlying complaint of discrimination/harassment is unsubstantiated. Even when there is an agency complaint (OCR) or a lawsuit filed, the protection against retaliation attaches.

### What are the legal Standards for Retaliation under the First Amendment?

In order to state a claim for First Amendment Retaliation, the individual must show that the following:

1. Their speech was constitutionally protected,
2. The alleged retaliatory action adversely affected their protected speech or “would chill a person of ordinary firmness from continuing to engage in the protected activity” (*O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016), and
3. A causal relationship between the speech and the retaliatory action or that the protected activity was a substantial motivating factor.

### What is Protected Speech?

Any speech or expression EXCEPT speech or expression that falls within the very limited exceptions such as incitement, obscenity, fighting words, and offensive speech, and threats, which takes place within legally valid time place and manner restrictions.

### What is an Adverse Action under a First Amendment Claim?

The government (District/college) responded to their protected activity with conduct or speech that would chill or adversely affect their protected activity—this means that the retaliatory conduct “would likely deter ‘a person of ordinary firmness’ from the exercise of First Amendment rights. This is very fact-specific and the court looks at the:

1. the status of the speaker,
2. the status of the retaliator,
3. the relationship between the speaker and the retaliator, and
4. the nature of the retaliatory acts

### How do you show a causal relationship between the speech and the retaliatory action?

The person alleging retaliation must show, at the very least, that the District/college was aware that they engaged in a protected activity. The test is generic and objective.

### Can you discipline students who are disruptive?

YES. The courts have held that the First Amendment does not give a free pass to individuals who violate District/college rules simply because they can plausibly show that faculty or administrators disapprove of their protected speech. The free speech retaliation analysis lies between the disagreement with the expressed

protected speech and the actions taken to either punish and or muzzle the individual in retaliation for the expression of the protected speech. The goal here is for the District/college to show that it would have taken the same disciplinary actions in the absence of the protected activity.

Recent Ninth Circuit Case—Reporting professor’s sexual harassment and subsequent retaliation claim: *Richardson-Bass v. State Center Community College District*, No. 1-19-cv-01566-AWI-SAB, 2020 U.S. Dist. LEXIS 175251 (E.D. Cal. Sep. 23, 2020).

Plaintiff, a former student at Fresno City College, alleged that the college violated Title IX by being deliberately indifferent to her report that she had been sexually harassed by one of her professors. She also alleged that the College retaliated against her for making that report. Defendant’s Motion to Dismiss granted in part and denied in part. Plaintiff sufficiently stated a claim under Title IX and California state law for sexual harassment because a reasonable factfinder could conclude that the professor’s sexual proposition to Plaintiff was sufficiently severe because he was in a position of authority over Plaintiff, the solicitation was direct, and it was made while Plaintiff and the professor were alone in a classroom. Plaintiff also adequately stated a deliberate indifference claim because she alleged that the person in the counseling center to whom she reported the professor’s proposition was an appropriate person and had authority to take corrective action. However, Plaintiff’s retaliation claim failed because she did not allege that she suffered any materially adverse action. State law claims were subsequently dismissed in January 2021.

## PART TWO: Employees

Retaliation occurs when an employer punishes an employee for exercising their workplace rights. Punishment can be any adverse action that might deter a reasonable employee from pursuing protected activities.

Examples of adverse actions include:

Termination

Constructive discharge, when punishment drives an employee to quit

Demotion or lack of promotion

Discipline

Poor performance reviews

Unfavorable changes in assignments, hours, or duties

Verbal abuse or a hostile work environment

Retaliation is the toughest charge to shake. It’s not uncommon for employers to win a discrimination or harassment lawsuit only to lose on the accompanying retaliation claim.

The fear of having a retaliation complaint filed against you should not stop a manager/supervisor/director from addressing workplace issues, even if there is an active investigation into allegations of discrimination or harassment—if there is a facially legitimate, non-retaliatory reason for the action.

### What is whistleblower retaliation?

Whistleblower retaliation is the act of an employer punishing an employee for protected activity, such as reporting an injury, safety concern, mismanagement, abuse of authority, or legal violation in the workplace.

### When Is Retaliation Prohibited?

Federal/state law protects employees from retaliation when employees complain—either internally or to an outside body like the Equal Employment Opportunity Commission (EEOC)—about workplace discrimination or harassment. That's true even if the claim turns out to be unfounded, as long as it was made in good faith.

The law also protects employees who cooperate in EEOC investigations or serve as witnesses in EEOC investigations or litigation or who take legally-protected FMLA leave. The Supreme Court has also confirmed that an employee's participation as a witness in an internal investigation is protected, too.

### When is it not retaliation?

Sometimes, it's hard to tell whether your employer is retaliating against you. For example, if you complain about your supervisor's harassing conduct and the complaint is not substantiated, however your supervisor's attitude and demeanor towards you changes. In fact, now your supervisor now acts more professionally towards you and no longer engages in chit chat with you. This isn't retaliation, even if your supervisor isn't as friendly as they once were. **Only changes that have an adverse effect on your employment are retaliatory.**

On the other hand, if your supervisor fired you for not being a "team player" a week after you complained to Human Resources about their harassing conduct, you may have cause to believe the action may be retaliatory. But remember, not every retaliatory act is obvious or necessarily means your job is threatened. Retaliation may come in the form of an unexpected and unfair poor performance review, the boss micromanaging everything you do, or sudden exclusion from staff meetings on a project you've been working on.

### What are the consequences of workplace retaliation?

Retaliation can be costly. Firing an employee or making them so miserable that they quit, is often the flash point that sparks formal charges and lawsuits.

Substantiated claims of retaliation can lead to:

Double back wages

Compensation for lost benefits

Damages for emotional distress or other harm

Reinstating the employee, providing training, or other remedies

Punitive damages or penalties

Retaliation can also damage employee morale across the District/college morale, productivity, and retention rates.



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