

APPENDIX A-9: RETALIATION AND INTERFERENCE: COMPLAINT PROCESSING OUTLINE AND CHECKLIST

The OFCCP regulations implementing Executive Order 11246, Section 503 and VEVRAA, titled “Intimidation and Interference”⁴²⁷ state that a contractor “shall not harass, intimidate, threaten, coerce or discriminate against any individual because the individual has engaged in or may engage in” a protected activity. This not only encompasses protection against retaliation but it also provides protection against intimidation and interference that may not give rise to a retaliation claim. As such, examine complaint allegations to determine whether Title VII principles regarding retaliation claims apply or the broader protection of OFCCP’s regulations against intimidation and interference is applicable.

Additionally, there is a difference in available remedies. Compensatory and punitive damages are not available under the laws OFCCP enforces but may be under Title VII and the ADA. Complaints filed with OFCCP that could also be brought under Title VII or the ADA, as enforced by EEOC, are dual filed for the purpose of complaint processing.

A. RETALIATION

When assessing possible retaliation under Executive Order 11246, Section 503 and VEVRAA, OFCCP applies the same concepts, standards and analyses as EEOC. There are three essential elements of a retaliation claim: protected activity (opposition to discrimination or participation in the filing or investigation of a complaint, compliance evaluation, hearing or other activity), materially adverse action taken by the contractor, and causal connection between the protected activity and the materially adverse action. Each of these three elements is discussed below.

1. Protected Activity (participation in an EEO process or opposition to discrimination)

- a. Did the Complainant oppose discrimination?
 - Did the Complainant explicitly or implicitly communicate to the contractor or another covered entity a belief that its activity constituted unlawful discrimination under E.O. 11246, Section 503 or VEVRAA?
 - If the protest was broad or ambiguous, would the complainant’s protest reasonably have been interpreted as opposition to such unlawful discrimination?
 - Did someone closely related to, or associated with, the Complainant oppose discrimination?
- b. Was the manner of opposition reasonable? Or was the manner of opposition done in so disruptive or excessive a manner as to be unreasonable?
 - If the manner of opposition was not reasonable, the complainant is not protected under the anti-retaliation clauses.

⁴²⁷ 41 CFR 60-1.32; 60-300.69; and 60-741.69.

- c. Did the Complainant have a reasonable good faith belief that the opposed practice violated the anti-discrimination laws or could do so if repeated?
 - If so, the complainant is protected against retaliation, even if he or she was mistaken about the unlawfulness of the challenged practices.
 - If not, the complainant is not protected under the anti-retaliation clauses.
- d. Did the Complainant participate in the complaint process or did the Complainant or someone closely related to or associated with the Complainant file a charge, or testify, assist, or participate in any manner in an investigation, proceeding, hearing, or lawsuit under the laws enforced by OFCCP?
 - If so, the Complainant is protected against retaliation regardless of the validity or reasonableness of the original allegation of discrimination.
 - The Complainant is protected against retaliation by a contractor for participating in the complaint process or other proceedings under the laws enforced by OFCCP even if that complaint involved a different contractor.

2. Materially Adverse Action

- a. Did the contractor subject the Complainant to any kind of adverse treatment?
 - Adverse actions undertaken after the Complainant's employment relationship with the contractor ended, such as negative job references, can be challenged.
 - Although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no requirement that the adverse action affect the terms, conditions or privileges of employment.

3. Causal Connection

The causation standard requires the evidence to show that “but for” a retaliatory motive, the contractor would not have taken the adverse action. The but-for causation standard does not require retaliation to be the sole cause of the action. There can be multiple but-for causes and retaliation need be only one of the but-for causes of the materially adverse action in order to establish unlawful retaliation.

- a. Is there direct evidence that retaliation was a but-for cause of the adverse action?
 - i. Did the company official admit that it undertook the adverse action because of the protected activity?
 - ii. Did the company official express bias against the Complainant based on the protected activity? If so, is there evidence linking that statement of bias to the adverse action?

Federal Contract Compliance Manual (FCCM)

- Such a link would be established if, for example, the statement was made by the decision-maker at the time of the challenged action.
- b. Is there circumstantial evidence that retaliation was a but-for cause of the adverse action?
- c. Is there evidence raising an inference that retaliation was a but-for cause of the adverse action?
- Such an inference is raised, for example, if the adverse action took place shortly after the protected activity, as long as the decision-maker was aware of the protected activity before undertaking the adverse action.
 - If there was a long period of time between the protected activity and the adverse action, determine whether there is other evidence raising an inference that a but-for cause of the adverse action was retaliation.
- d. Has the contractor produced evidence of a legitimate reason for the adverse action unrelated to the protected activity?
- e. Is the contractor's explanation a pretext designed to hide retaliation?
- Did the contractor treat similarly situated employees who did not engage in protected activity differently from the Complainant?
 - Did the contractor subject the Complainant to heightened scrutiny after he or she engaged in protected activity?
 - If, on the basis of all of the evidence, the CO is persuaded that retaliation was for a but-for cause of the adverse action, then "cause" must be found.
- f. OFCCP must be able to show that the contractor would not have taken the same action, absent its retaliatory motive. If it cannot demonstrate that, then causation has not been established.

B. SPECIAL REMEDIES ISSUES

- a. Is it appropriate to seek temporary or preliminary relief pending final disposition of the complaint?
- b. Is there a substantial likelihood that the challenged action will be found to constitute unlawful retaliation?
- c. Will the retaliation cause irreparable harm to the Complainant and/or the OFCCP?
- Will the Complainant likely incur irreparable harm beyond financial hardship because of the retaliation?

Federal Contract Compliance Manual (FCCM)

- If the retaliation appears to be based on the Complainant's filing of a prior EEO complaint, will that retaliation likely cause irreparable harm to OFCCP's ability to investigate the Complainant's original complaint of discrimination?
 - If there is a substantial likelihood that the challenged action will constitute retaliation and that retaliation will cause irreparable harm to the Complainant or the OFCCP, or both, contact the Regional Solicitor's (RSOL) office to ask about pursuing temporary or preliminary relief.
- d. If the complaint is dually filed under Title VII or the ADA (or both), consult your RSOL to help determine whether compensatory and punitive damages are available and appropriate.
- Compensatory and punitive damages may be available for retaliation claims under all of the statutes enforced by the EEOC.